SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 198

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF IMMIGRATION, AND CHARLES DREHER, INSPECTOR IN CHARGE UNITED STATES IMMIGRATION SERVICE, PETITIONERS,

vs.

UNITED STATES OF AMERICA, ON THE PETITION OF PRESTON M. ALBRO, AN ATTORNEY, FOR MARY COOK AND ANTONIO DANEION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In United States District Court, Western District of New York

THE UNITED STATES OF AMERICA, ON THE PETITION OF PRESTON M. Albro, an attorney, for Mary Cook and Antonio Danelon, relators

against

ARTHUR J. KARNUTH, UNITED STATES DISTRICT DIRECTOR OF IMMIGRATION, and Charles Dreher, inspector in charge United States Immigration Service, respondents

Writ of habeas corpus

The President of the United States of America to Arthur J. Karnuth and/or Charles Dreher, immigration official, or other person having the custody of the relators, greeting:

You are hereby commanded to bring the bodies of Mary Cook and Antonio Danelon, two aliens, by you detained, it is said, to the United States District Court for the Western District of New York, to be held on the 2nd day of December, 1927, at ten o'clock in the morning, or as soon thereafter as counsel can be heard, together with the causes of the aliens' detention, and have then and there with you this writ.

2 Witness: Honorable John R. Hazel, one of the United States district judges for the western district of New York, this 1st day of December, 1927.

HARRIS S. WILLIAMS,
Clerk.

By MAY C. SICKMON,
Chief Deputy.

Writ allowed.
[SEAL.]

JOHN R. HAZEL,
United States District Judge.

3 In United States District Court
[Title omitted.]

Petition for writ of habeas corpus

The petition of Preston M. Albro respectfully shows to this honorable court and alleges on information and belief.

1. That the relators Mary Cook and Antonio Danelon are aliens and are illegally held in custody by the respondents herein under color of authority as United States immigration officials.

2. That on the first day of December, 1927, the relators Mary Cook and Antonio Danelon came from Canada and presented themselves to an immigration inspector, and stated to him as follows: The said Mary Cook stated that she was born in Scotland, came to

4 Canada in May, 1924, and desired to find employment in Buffalo, to return every night to her home in Canada. The said

Antonio Danelon stated that he was born in Italy, came to Canada in 1923, became a Canadian citizen in 1924 by his father's naturalization, and was, since November, 1926, in the employ of the United States Lighting & Heating Corporation at Niagara Falls, New York, and that he was on his way to his employment, and that he intended to return in the evening to his home in Niagara Falls, Canada.

3. Both aliens stated that they were not immigrants, did not intend to reside in the United States, but had only the desire of finding work in the United States or continuing their work in the United States, and each of them was held by the respondents herein, as "Immigrants not in possession of an unexpired immigration visa."

4. That the aliens are about to appeal to the Secretary of Labor from this decision of the immigration officials, but that the taking of such an appeal is an empty ceremony, as the Secretary of Labor has recently promulgated regulations generally known as General Order 86, in which he has stated that persons desiring to look for work or persons desiring to continue work are hereafter and beginning this day to be classified or considered as immigrants. The petitioner respectfully shows that this position of the Secretary of Labor is contrary to and in violation of the statute for such purpose made and provided, in that section 3 of the immigration act expressly
5 exempts aliens visiting the United States temporarily for business from the classification of immigrants.

5. Petitioner further shows that this application to the court is made prematurely and in advance of a decision by the Secretary of Labor on the appeal by reason of the fact that the immigration officials at the port of Buffalo continuously violate section 17 of the immigration act of 1917, which provides that the taking of an appeal shall operate to stay any action in regard to the final disposition of the aliens whose case is appealed, until after a decision shall have been rendered by the Secretary of Labor, in that the immigration officials always return the aliens to Canada in advance of the decision of the Secretary of Labor, and immediately after an appeal is taken, thereby making it impossible to test the correctness of the decision or the rulings of the Secretary of Labor in proper proceedings, and it is desired to keep the aliens within the jurisdiction of the court where they now are, so that this court may determine the propriety of their custody.

6. The reason this petition is verified by the petitioner and not by the relators, is the fact that there is no time to obtain the signature and verification of the relators before these aliens are returned to Canada contrary to the provisions of the statute cited in the foregoing paragraph, and all the information about the retention
6 of the aliens has been received by the petitioner by telephone from Mr. H. Ely Goldsmith, an American citizen, who was present when the aliens were taken in custody.

Therefore petitioner prays in behalf of the aliens that a writ of habeas corpus issue out of this court under the seal thereof, directing the respondents to bring the bodies of the relators into court for such disposition as the court may make of them in the premises.

And your petitioner will ever pray.

(Signed) PRESTON M. ALBRO.

[*Duly sworn to by Preston M. Albro; jurat omitted in printing.*]

In United States District Court

[Title omitted.]

Return to writ of habeas corpus as to Relator Antonio Danelon

Arthur J. Karnuth, acting district director of immigration at Buffalo, New York, within the western district of New York, respectfully alleges and returns—

That the petitioner, Antonio Danelon, is not in his custody and is not detained by him; that the said Antonio Danelon was given a hearing on December 1, 1927, at a meeting of a board of special inquiry held at Buffalo, New York. A copy of the minutes taken upon said hearing being hereto annexed and made a part of this return.

That upon the testimony taken the board of special inquiry refused the alien, Antonio Danelon admittance to the United States on the ground that he was not in possession of an unexpired consular immigration visa required under the Immigration Act of May, 1924; that the Immigration Inspectors Zinns, Shanahan and Stables, who conducted the hearing, were duly authorized to examine the petitioner as to his right to remain within the United States and that the petitioner was given a fair hearing and granted his full legal rights in the premises.

The petitioner was advised by said board of special inquiry of his right to appeal to the Secretary of Labor, and that said petitioner, Antonio Danelon, decided to avail himself of that right.

Wherefore respondent prays that the writ of habeas corpus herein be dismissed.

Dated, Buffalo, N. Y., December 5th, 1927.

ARTHUR J. KARNUTH,
Acting District Director of Immigration.

[*Duly sworn to by Arthur J. Karnuth; jurat omitted in printing.*]

9 IN UNITED STATES DISTRICT COURT

Testimony, attached to return on Relator Danelon

December 1, 1927.
BUFFALO, N. Y.

DANELON, ANTONIO.

CHAIRMAN ZINNS.
SECRETARY SHANAHAN.
INSPECTOR STABLES.

PEACE BRIDGE, 12/1/27.

Zinns. NO C. I. V.

11:00 A. M. to 11:15 A. M.

Appealed.

Alien duly sworn:

Age 17; m; s; lead burner; Canada?; No. Italian; reads and writes Italian, Class 4 (5970); in the United States transit, 1923; Philadelphia; accompanied by H. Ely Goldsmith, attorney; Canada, Niagara Falls, Ontario; father, Pietro, 141 Acheson Avenue, Niagara Falls, Ont.; $5.00; self.

Destination: Niagara Falls, N. Y., to U. S. Light & Heat Co.

Med. Cert.: None.

Landed: Philadelphia, Pa., September 25, 1923, "Colombo."

Obj. Migr.: Cross daily to employment.

Ht. 5' 9"; dark; brown; brown; born in Teglee Bonito, Italy, January 17, 1910.

CHAIRMAN to alien:

Q. What is the purpose of your appearance here?

A. My attorney, Mr. Goldsmith, is here and would like to represent me.

Goldsmith to appear before this board of special inquiryETAOIN

Q. According to subdivision B of rule 11, it will be impossi-
10 ble for Mr. Goldsmith to appear before this board of special inquiry and represent you as your attorney.

H. Ely Goldsmith appears before BSI:

I would like to make a statement regarding my appearance in this case. I desire to state to the board that the United States District Court of Alabama, in the case of Miers v. Brownlow, reported in 21 Federal Reporter, second series, has held that the provision of the 1917 immigration act holding that special inquiry hearings shall be separate and apart from the public does mean only that they shall be held separate and apart from the curious public and not separate and apart from counsel for the alien. That in the case an alien through his counsel personally makes a request for his counsel to be present in behalf of the alien, and the board refuses counsel to be present during the entire hearing, that then in that event the hearing is not fair and will be set aside by the courts.

CHAIRMAN to Attorney Goldsmith:

Q. You at this time make a request that you be allowed to represent this man before a board of special inquiry?

A. Yes.

Q. Under the provisions of subdivision B of rule 11, it will be impossible for you to represent this alien before a board of special inquiry.

A. All right; I'll withdraw.

Attorney excused. CHAIRMAN to alien:

Q. Were you ever examined and refused admission to the United States?

A. No.

11 Q. Have you ever been arrested or convicted of any crime either in Canada, Italy, or any other country?

A. No.

Q. Have you ever found it necessary to apply for charity in Canada, Italy, or anywhere?

A. No.

Q. Have you ever been sick or confined in any hospital?

A. No.

Q. Have you been promised or assured employment in the United States?

A. Yes; I am working now.

Q. Where are you employed?

A. At the United States Light and Heat, Niagara Falls, N. Y.

Q. How long have you been employed at the United States Light and Heat?

A. I have been working at Niagara Falls, N. Y., since Nov. 6, 1926.

Q. Have you worked for any other company in the United States other than the United States Light and Heat?

A. I worked for two months at the Aluminum at Niagara Falls, N. Y.

Q. When did you start to work at the Aluminum Co.?

A. I first worked at the United States Light and Heat. I worked there for eight months, then I was laid off and went to work at the Aluminum for two months. Then I was sent for at the U. S. Light again so I have been working there since.

Q. Have you worked for any other company in the United States?

A. No.

Q. During the time you have worked at the United States Light and Heat Company where have you resided?

A. In Niagara Falls, Ontario.

Q. With whom have you been making your home?

A. My father and mother.

12 Q. What is your father's name?

A. Pietro.

Q. What is his address?

A. 141 Acheson Avenue.

Q. During the period you have worked on the American side at Niagara Falls, N. Y., where did you cross the border?

A. Lower Arch Bridge.

Q. You crossed daily at the Lower Arch Bridge, Niagara Falls, N. Y.?

A. Yes.

Q. Were you at any time in possession of an identification card issued by any immigration officer?

A. Yes.

Q. Have you that card with you now?

A. Yes.

(Alien presents identification card No. 2748, in the name of Antonio Danelon, issued at Niagara Falls, N. Y., on November 6, 1926.)

Q. At any time since you have been crossing the United States border from Niagara Falls, Ontario, to Niagara Falls, N. Y., to your daily employment have you filled out what was called a crossing form?

A. Yes, sir. I was handed what was known as crossing form 2543, which was surrendered by me to Inspector Fred S. Murphy.

(Alien presents the stub of the crossing form.)

Q. Since the first of January, 1927, while you were crossing from Canada to the United States at the Lower Arch Bridge or any other point, were you informed that it would be necessary for you in
13 order to continue your employment in the United States to obtain a quota visa from a United States consul in Canada?

A. Yes, sir.

Q. Did you file your application for a quota visa with the United States consul in Canada?

A. I believe my father made application for a visa for himself and the whole family two years ago.

Q. Have you consulted with the United States consul recently regarding your immigration visa?

A. He told me he could do nothing for me now.

Q. Then at the present time you are not in possession of an unexpired consular immigration visa entitling you to remain in the United States or to cross daily for employment?

A. No.

Q. What wages do you make at the U. S. Light and Heat?

A. We work piecework, about $25 a week; $25 to $40.

Q. Have you any money saved in the bank or anywhere?

A. No; I give it all to my father and mother.

Q. Have you ever lived in the United States?

A. No.

Q. Is it your intention to come to the United States to make your home here?

A. No, sir; not myself.

Q. What is your intention?

A. To come to work.

Q. Is your intention simply to live on the Canadian side and come back and forth daily?

A. Yes.

Q. In case your parents get a visa, what will you do?
A. If I am forced to, I will go with my father. If my folks move over I will have to go. I couldn't stay over there alone.

14 Inspector STABLES to alien:

Q. Have you any evidence of your father's Canadian citizenship with you?
A. No.
Questions? None.
Inspector STABLES. I move to refuse this alien admission to the United States on the ground that he is not in possession of an unexpired consular immigration visa required under the immigration act of May, 1924.
Secretary SHANAHAN. I second the motion.
Chairman ZINNS. Unanimous.
CHAIRMAN (to alien). This board has voted to refuse you admission to the United States on the ground that you are not in possession of an unexpired consular immigration visa required under the immigration act of May, 1924.
From this decision you have the right of appeal to the Secretary of Labor at Washington, D. C., to whom if you should appeal this entire record will be sent for his review.
Q. Do you wish to appeal?
A. Yes.
Q. Do you wish the reply to your appeal by letter or telegram?
A. Letter.
Q. At what address in Canada do you wish to be notified as to the result of your appeal?
A. 141 Acheson Avenue, Niagara Falls, Ontario.

Alien is carefully warned that unless the decision of the
15 board is reversed, it will be unlawful for him to enter the United States unless in possession of an immigration visa.

Alien is further advised that illegal entry will render him liable to arrest and deportation.
Writ of habeas corpus served on chairman and aliens held pending further instructions.

Chairman ZINNS.
REJ: NO CIV

C. P. H. DREHER,
Inspector in Charge.

Appealed.
Certified to be a correct transcript.

D. SHANAHAN,
Secretary.

December 2, 1927.
BUFFALO, N. Y.

DS 1/15

CHAIRMAN ZINNS.
SECRETARY SHANAHAN.
INSPECTOR FELDER.

DANELON, ANTONIO.

PEACE BRIDGE. 12/2/27.
NO C.I.V.

11:30 AM to 11:45 AM

Appealed.

Reopening:

Mr. H. Ely Goldsmith, of 105 West 40th St., New York City, appears before the board of special inquiry at the Peace Bridge accompanied by the alien Antonio Danelon. This alien had been debarred here on the first instant on the ground that he was not in possession of an unexpired consular immigration visa required under the immigration act of 1924. He entered an appeal and the
16 Chairman was served with a writ of habeas corpus to produce the alien in court this morning. The alien appeared in the United States District Court for the Western District of New York before the Honorable Judge John R. Hazel, represented by Mr. Goldsmith. Mr. Goldsmith in court moved to set aside the hearing of the board of special inquiry as unfair because the alien was not permitted counsel during the hearing, and the court granted the motion and remanded the alien into the custody of the board of special inquiry with instructions to reopen the hearing and allow Mr. Goldsmith to appear as counsel.

Alien duly sworn.

Mr. GOLDSMITH to board of special inquiry. I object to the form of the third question on page 4 of the record calling for a conclusion as to what an unexpired consular immigration visa entitles an alien to do. The question should have read merely "then at the present time you are not in possession of an unexpired consular immigration visa."

I object to the last question by the chairman on page 4, reading "In case your parents get a visa, what will you do?" as incompetent, irrelevant, and immaterial, calling for a conclusion in case of a contingency which may never happen.

Mr. GOLDSMITH to alien, Antonio Danelon:

Q. You were asked by the chairman what you would do if your parents would get an immigration visa. I ask you now, have
17 you at the present time any intention whatsoever of permanently immigrating into the United States either at this time or at a later time?

A. No.

CHAIRMAN to alien:

Q. When you were asked the question, "In case your parents get a visa, what will you do," you said, "If I am forced to I will go with my father. If my folks move over I will have to go. I couldn't stay over there alone." What do you mean by that?

A. I mean if I am forced to go I will.

Q. You mean then if your father came over you would come also?

A. If I am forced to.

Q. What do you mean by that?
A. I wouldn't go unless I was forced to.
Questions? None.
Inspector FELDEN. I move to reaffirm the motion as made by Inspector Stables that this alien be debarred from the United States on the ground that he has no unexpired consular immigration visa required under the immigration act of 1924.
Secretary SHANAHAN. I second the motion.
Chairman ZINNS. Unanimous.
CHAIRMAN (to alien). This board has voted to refuse you admission to the United States on the ground that you have no unexpired consular immigration visa required under the immigration act of May, 1924.
From this decision you have the right of appeal to the Secretary of Labor at Washington, D. C., to whom, if you should appeal, this entire file will be sent for his review. Do you wish to appeal?
18 A. Yes. I wish the reply sent to my address, 141 Acheson Avenue, Niagara Falls, Ontario, by letter.
Alien is advised that illegal entry will render him liable to arrest and deportation.
By the order of the court the alien was paroled into the custody of Mr. Goldsmith.
Rej: NO CIV.
CHAIRMAN ZINNS.

C. P. H. DREHER,
Inspector in Charge.

Appealed

Certified to be a correct transcript.

D. SHANAHAN,
Secretary.

19 In United States District Court

[Title omitted.]

Return to writ of habeas corpus as to relator Mary Cook

Arthur J. Karnuth, acting district director of immigration at Buffalo, New York, within the western district of New York, respectfully alleges and returns.
That the petitioner, Mary Cook, is not in his custody and is not detained by him; that the said Mary Cook was given a hearing on December 1, 1927, at a meeting of a board of special inquiry held at Buffalo, New York. A copy of the minutes taken upon said hearing being hereto annexed and made a part of this return.
That upon the testimony taken the board of special inquiry refused the alien, Mary Cook admittance to the United States on the ground that she was not in possession of an unexpired consular immigration visa required under the immigration act of May 1924; that the immigration inspectors, Zinns, Shana-
20

han, and Stables, who conducted the hearing were duly authorized to examine the petitioner as to her right to remain within the United States and that the petitioner was given a fair hearing and granted her full legal rights in the premises.

The petitioner was advised by said board of special inquiry of her right to appeal to the Secretary of Labor and that said petitioner, Mary Cook, decided to avail herself of that right.

Wherefore respondent prays that the writ of habeas corpus herein be dismissed.

Dated, Buffalo, N. Y., December 5, 1927.

ARTHUR J. KARNUTH,
Acting District Director of Immigration.

[*Duly sworn to by Arthur J. Jarnuth; jurat omitted in printing.*]

21 In United States District Court

Testimony attached to return on Relator Cook.

Ds 1/6

December 1, 1927.
BUFFALO, N. Y.
CHAIRMAN ZINNS.
SECRETARY SHANAHAN.
INSPECTOR STABLES.

COOK, MARY.

PEACE BRIDGE, 12/1/27.

Zinns. No. C. I. V.
11:30 AM. to 11:45 AM.
Appealed.
Alien duly sworn:
Age 20; f; s; spinner; Scotland; Scotch; reads and writes English; $1.25; Canada; Niagara Falls, Ontario; father, Robert, 991 Huron Street, Niagara Falls, Ontario; accompanies by H. Ely Goldsmith, attorney; never in the United States; self.
Destination: Buffalo, N. Y.
Med. Certs: None.
Landed: Quebec, May 3, 1924, ex ss "Athenia."
Obj Migr: Cross daily to employment.
Ht. 5'0"; med; bro; gr-blue; born in Blackgrove, Scotland; 1/17/1907.

CHAIRMAN to alien:

Q. What is the purpose of your appearance here?

A. My attorney, Mr. Goldsmith, is here and would like to represent me.

Q. According to Subdivision B of rule 11, it will be impossible for Mr. Goldsmith to appear before this board of special inquiry and represent you as your attorney.

22 H. Ely Goldsmith appears before B. S. I.:

I would like to make a statement regarding my appearance in this case. I desire to state to the board that the United States

District Court of Alabama, in the case of Miora v. Brownlow, reported in 21 Federal Reporter, second series, has held that the provision of the 1917 immigration act holding that special inquiry hearings shall be separate and apart from the public does mean only that they shall be held separate and apart from the curious public and not separate and apart from counsel for the alien. That in the case an alien through his counsel personally makes a request for his counsel to be present in behalf of the alien, and the board refuses counsel to be present during the entire hearing, that then in that event the hearing is not fair and will be set aside by the courts.

CHAIRMAN to Attorney Goldsmith:

Q. You at this time make a request that you be allowed to represent this woman before a board of special inquiry?

A. Yes.

Q. Under the provisions of subdivision B of rule 11, it will be impossible for you to represent this alien before a board of special inquiry.

A. All right; I'll withdraw.

Attorney excused. CHAIRMAN to alien:

Q. Were you ever examined and refused admission to the U. S.?

A. No. I was over here three weeks and he came and told me to go back to Canada.

23. Q. In other words, you came over here and while you were here you found employment, the immigration found it out and told you to return to Canada?

A. Yes.

Q. You were crossing back and forth daily?

A. Yes. I had been crossing daily for three weeks. He said I couldn't come back till I got papers.

Q. Have you ever had any difficulty with the authorities anywhere?

A. No.

Q. Have you been promised work in the United States?

A. No.

Q. Your purpose in coming here now is to seek employment?

A. Just to look for a job.

Q. Where do you reside?

A. Niagara Falls, Ontario, with my parents.

Q. What is your father's name?

A. Robert Cook, 991 Huron St.

Q. How much money have you in your possession now?

A. $1.25, just enough to look for a job and go back. My mother gave me enough for my fare.

Q. At any time while you were crossing the bridge at Niagara Falls were you told it would be necessary to obtain a visa from the American consul to work here?

A. No.

Q. Weren't you told about that when you were returned to Canada?

A. No; they said nothing about a visa.
Q. Have you ever made application anywhere for a visa?
A. No.
Q. Have you any money in the bank?
A. No.
Q. Do you own any property anywhere?
A. No; I give my parents my wages.
24 Q. You are entirely dependent on your folks for support?
A. Just now; you see when I work I give them my wages.
Q. How long have you lived at Niagara Falls, Ontario?
A. We came right to Niagara Falls from the old country.
Q. Where have you been working since coming to Canada?
A. Burgess Battery, Niagara Falls, Ontario; then I was in domestic service on the other side.
Q. Can you read and write?
A. Yes.
(Alien is tested and reads English very fluently.)
Q. Do you intend to commute from Niagara Falls, Ontario, to Buffalo every day if you get a job?
A. Yes. At the Falls I was only getting $3.00 a week.

Inspector STABLES:

Q. Is $1.25 all the money?
A. Yes. I have $40 if I can collect it. I lent it to these people thru my girl friend.
Q. You intend to come from Niagara Falls to Buffalo each day?
A. Yes.

Chairman ZINNS:

Q. What is your reason for appearing at Buffalo, N. Y., for permission to make application when you live in Niagara Falls, Ontario, and the bridges are handier there?
A. There is a silk mill in Buffalo.
25 Q. If you had been admitted to the United States where would you make your home?
A. I intend to go back and forth from Niagara Falls; I have a Ford car.
Q. Are you the owner of the car?
A. It is in my name. It belongs to the family. My brother drives it.
Q. Is the car paid for?
A. Yes.
Q. What does your father do?
A. He works for the city. He gets 45c an hour.
Q. How many are there in the family?
A. Four.
Q. How old are they?
A. The oldest is 22, the youngest 13.
Q. How many are dependent upon your father for support?
A. The two younger ones only.

Chairman ZINNS:

Q. Does your father own any property?

A. We are buying that house.

Q. Do you know how much he has paid on it?

A. No.

Q. Do you know if he has any money in the bank?

A. No.

Q. Have you ever had an identification card to cross for employment?

A. No.

Questions? None.

Inspector STABLES. I move to refuse this alien admission to the United States on the ground that she has no unexpired consular immigration visa required by the immigration act of 1924.

Secretary SHANAHAN. I second the motion.

26 Chairman ZINNS. Unanimous.

Chairman (to alien). This board has voted to refuse you admission to the United States on the ground that you are not in possession of an unexpired consular immigration visa required under the immigration act of 1924.

From this decision you have the right of appeal to the Secretary of Labor at Washington, D. C., to whom, if you should appeal, this entire file will be sent for his review.

Q. Do you wish to appeal?

A. Yes.

Q. Do you wish the reply to your appeal by letter or telegram?

A. Letter.

Q. At what address in Canada do you wish to be notified as to the result of your appeal?

A. 991 Huron St., Niagara Falls, Ontario.

Alien is advised that unless the decision of the board is reversed, it will be unlawful for her to enter the United States until in possession of an unexpired consular immigration visa.

Alien is further warned that illegal entry will render her liable to arrest and deportation.

Writ of habeas corpus is served on chairman, and alien is held pending further instructions.

C. P. H. DREHER,
Inspector in Charge.

Chairman ZINNS.
Rej No Civ. Appealed.

Certified to be a correct transcript.

D. SKANAHAN, *Secretary.*

27 DS 1/15

December 2, 1927.
BUFFALO, N. Y.

COOK, MARY.

CHAIRMAN ZINNS.
SECRETARY SHANAHAN.
INSPECTOR FELDEN.

PEACE BRIDGE, 12/2/27.
NO C. I. V.

11:15AM to 11:24AM

Appealed.

Reopening—

Mr. H. Ely Goldsmith, of 105 West 40th Street, New York City, appears before the board of special inquiry at the Peace Bridge, accompanied by the alien, Mary Cook. This alien had been debarred here on the first instant on the ground that she was not in possession of an unexpired consular immigration visa required under the immigration act of 1924. She entered an appeal and the chairman was served with a writ of habeas corpus to produce the alien in court this morning. The alien appeared in the United States District Court for the Western District of New York before the Honorable Judge John R. Hazel, represented by Mr. Goldsmith. Mr. Goldsmith in court moved to set aside the hearing of the board of special inquiry as unfair because the alien was not permitted counsel during the hearing, and the court granted the motion and remanded
28 the alien into the custody of the board of special inquiry with instructions to reopen the hearing and allow Mr. Goldsmith to appear as counsel.

CHAIRMAN to counsel, Mr. Goldsmith:

Q. Are you ready to proceed at this time?

A. I am ready to proceed.

Mr. GOLDSMITH. I have no further questions in regard to the alien, Mary Cook, but desire to be notified by telegram of the decision of the Secretary of Labor, c/o Hotsford, Mitchell, Albro and Weber, attorneys for the alien in a habeas corpus proceeding, whose address is 925 Manufacturers Building, Buffalo, N. Y.

Inspector FELDEN. I move to reaffirm the motion as made by Inspector Stables, that this alien be debarred from the United States on the ground that she is not in possession of an unexpired consular immigration visa required under the immigration act of May, 1924.

Secretary SHANAHAN. I second the motion.

Chairman ZINNS. Unanimous.

CHAIRMAN (to alien). This board has again voted to exclude you from the United States on the ground that you are not in possession of an unexpired consular immigration visa required under the immigration act of 1924.

From this decision you have the right of appeal to the Secretary of Labor at Washington, D. C., to whom, if you should appeal, this entire file will be sent for his review. Do you wish to appeal?

A. Yes. I wish the reply sent to my home address, 991 Huron St., Niagara Falls, Ontario, by letter.

Alien is advised that illegal entry will render her liable to arrest and deportation.

By the order of the court the alien was paroled into the custody of Mr. Goldsmith.

REJ: NO CIV

C. P. H. DREHER,
Inspector in Charge.

Appealed.
Chairman ZINNS.

Certified to be a correct transcript.

D. SHANAHAN, *Secretary.*

[SEAL.]

In United States District Court

[Title omitted.]

Opinion on Writ of Habeas Corpus

Separate applications for writ, argued together, and involving substantially similar questions.

Botsford, Mitchell, Albro & Weber (Preston M. Albro, of counsel), Buffalo, New York; Robert A. Reid, D. C. L. of the Canadian Bar, of counsel on the brief, for relators.

Richard H. Templeton, United States attorney (Richard A. Grimm, assistant U. S. Attorney, of counsel), Buffalo, New York, for respondents.

HAZEL, District Judge. The petition herein for writ of habeas corpus, verified by the attorney for the relators, states, inter alia, that the relators are unlawfully unrestrained of their liberty and are detained under color of the authority of the United States immigration officials; that the relator Cook is a native of Scotland, residing in Niagara Falls, Ont., and had come to Buffalo to seek employment, while the relator Danelon is a native of Italy, who also resides in Niagara Falls, Ont., and is employed as a laborer in industries at Niagara Falls, N. Y. It appears, by the return, that the relators arrived here in the forenoon of December 1st, 1927, from their homes in Niagara Falls, Ont., across from the bridge at Niagara Falls, N. Y.; that both, for some time past, had been crossing back and forth daily, and neither intends to live in the United States, but they intend to continue residing in Canada; and that neither was possessed of an unexpired consular immigration visa, as required by the immigration act of 1924.

The special board of inquiry, consisting of three inspectors, before whom the hearing was had, thereupon unanimously refused admission to the aliens, advising them that they had the right to appeal to the Secretary of Labor, to which each replied that he wished to appeal. At the beginning of their hearing they requested that their attorney, H. Ely Goldsmith, Esq., be heard in their behalf, but this

request was denied upon the ground that they were not entitled to counsel under rule 11, sub. (2) of the immigration rules of March 1st, 1927.

32 Without requesting an appeal, and before their exclusion, the aliens applied for writ of habeas corpus, substantially claiming that they were not immigrants but were temporary visitors for business. At the hearing on the writ, counsel stated that it was not intended to appeal to the Secretary of Labor, since it was anticipated that the decision of the special board of inquiry would be sustained in view of General Order 86, which is attacked as contrary to the statute on the ground that sec. 3 of the immigration act exempts aliens visiting the United States temporarily for business from the classification of immigrants, and is inapplicable to the relators who came here to work and labor, or in search thereof. Failure to exhaust the remedy provided by law was strongly condemned in U. S. ex rel. Grau v. Uhl, 262 Fed. 532, and especially see U. S. v. Tuck, 194 U. S. 161; but I will pass on the questions presented, inasmuch as the facts are not in dispute and we are dealing solely with questions of law. It was also alleged in the petition that the writ was sought because sec. 17 of the immigration act of 1917, providing for a stay of deportation until an appeal taken was decided, was continually violated by the immigration authorities, and aliens returned to Canada before their appeals were taken, and without opportunity to test the correctness of their decisions. There is nothing before me to support this allegation. Indeed, I feel justified in assuming the contrary, since the immigration officials have always, as my experience has shown, treated aliens considerately and have allowed them

33 complete opportunity to test the validity of hearings in the courts, and have delayed deportations until the questions were finally passed upon. The relators were brought into court on the return day by defendants, director of immigration and inspector in charge, and by consent the proceedings were continued to allow time to file a return, the relators, meanwhile, being at large on their recognizance.

Counsel for the relators and the United States attorney, appearing for respondents, urge that this court should pass upon the right of aliens to be represented by counsel at hearings before the special board of inquiry, though the relators were accorded a second hearing, at which, as I understand it, they were represented by Mr. Goldsmith.

Since many aliens, not of Canadian birth or citizenship, arrive daily from Canada, who labor in this country, especially in the border cities, and who likewise have been refused counsel at hearings, under rule 11, the question of the right to exclude counsel will be considered.

Rule 11 of the immigration rules of March 1, 1927, reads as follows:

"Hearings before the boards shall be separate and apart from the public; but the alien may have one friend or relative present after the preliminary part of the hearing has been completed, provided—

"1. That such friend or relative is not and will not be employed by him as counsel or attorney."

34 This rule, or a similar rule, has several times been before the courts for construction in this circuit. In U. S. v. Williams, 190 Fed. 897, for example, the aliens, on their examination preliminary to admission, were refused counsel, and Judge Lacombe ruled that the statute did not authorize the presence of counsel at exclusion hearings; that where aliens had entered and had resided here, they occupied a different status, but that Congress evidently did not intend that the qualifications of aliens intending to enter the United States should be tested by trials calling for the presence of counsel to represent them. On the contrary, the learned court said: "Congress relegated this question to administrative boards who might act summarily and expeditiously, and, to provide against an abuse of their discretion, accorded to the alien a right of appeal to the Secretary of Labor."

See also U. S. ex rel., Falso v. Williams, 191 Fed. 1001, and U. S. v. Chin Fook Wah, 288 Fed. 953, and U. S. v. Greenawalt, 213 Fed. 901. The relators did not ask to have a friend or relative present, as permitted by the regulation under which the hearing was conducted, and, as the order or regulation expressly forbids the aid of counsel, there has been, in my opinion, no deprivation of any legal or constitutional right. The hearing was purely inquisitorial without its having any relation to a criminal examination or investigation. The entry or admission of aliens into the United

35 States, as said in the Greenawalt case, is a high privilege bestowed and not a legal right, and Congress has unquestionably the power to delegate officials or nonjudicial tribunals to exercise functions of a judicial or administrative character for the purpose of insuring effective compliance with the immigration laws, including the deportation of aliens who have unlawfully entered, or their exclusion at the boundary. It is not within the province of this court to attempt to control or interfere with the determination of such officials or tribunals, save only to protect aliens from the abuse of the discretion of administrative boards by way of habeas corpus.

But it is strongly urged that the enforcement of rule 11 is nothing less than a denial of due process of law, and that it is in conflict with rule 18, which permits the presence of counsel in deportation proceedings. I discover no conflict or inconsistency, since a distinction with relation to proceedings against aliens domiciled in the United States, and aliens stopped at the border for summary examination as to their right to enter, is believed to be a proper exercise of procedure; (U. S. v. Williams, supra); and the power to make such an order or regulation was not beyond the power delegated by Congress to the Bureau of Immigration. It is, however, urged that in Miers v. Brownlow, 21 Fed. (2d) 376, it was decided that rule 11 was unauthorized, and that its enforcement by a special board of inquiry constituted a denial to aliens of due

process of law, and, moreover, that the rule unjustly discriminates between aliens seeking admission and those proceeded against for deportation. It was, no doubt, truly said in that case that
36 there is no express provision in the statute giving power to the Secretary of Labor or the Bureau of Immigration to classify aliens or to make rules applicable to resident aliens and aliens subject to exclusion at the boundary. But rule 18, for example, which confers the right of counsel in deportation cases, has generally been accepted by the courts as being within the power and scope of the department, and may be said to have been established by usage and practice. Beyond this, however, the department, which is charged with the enforcement of the immigration act, has the right, and, indeed, it is its duty to prescribe orders, regulations and rules, not only with relation to the details of procedure, but any fair and reasonable rule or method which will enable effective enforcement of the statute. If the prescribed regulation is not in conflict with the immigration act, it certainly falls within the scope of official duty to establish it, even though it is not specifically indicated as to the details. U. S. v. Grimaud, 220 U. S. 506; U. S. v. Birdsall, 233 U. S. 251. It seems to me plain that a rule or order to expedite inquiries of aliens, or hearings before a special board of inquiry, at the border to summarily ascertain the qualifications of aliens desiring to enter the United States, should not match judicial trials or be conducted with similar procedural rules, and, therefore, the suggestion of deprivation of due process of law is not believed applicable; although due process of law, if a fair hearing is not accorded, may be tested on writ of habeas corpus.

The next point earnestly presented is that general order 86—a new order issued April 1st, 1927, by the Commissioner Gen-
37 eral, approved by the Assistant Secretary of Labor—is invalid and in contravention of the immigration act. The order relates to land border crossing procedure, and reads as follows:

"1. Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to seek employment in this country will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure, under any provisions of the immigration law, which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the 'immigrant' class.

"2. However, the following aliens of the said 'immigrant' class residing in foreign contiguous countries and who are now enjoying the border-crossing privilege may continue to so enjoy it upon the payment of head tax, provided such head tax was assessible on aliens entering permanently at the time of original admission, and, provided further, that they are not coming to seek employment."

It is with the first provision that we are herein chiefly concerned, since the second provision relates to aliens living in foreign contiguous countries whose border privilege to pass to and fro was continued

on payment of a head tax, and provided they are not coming to seek employment. The relators here are aliens domiciled in a foreign contiguous country and who are daily at work in this country
38 or who seek employment therein; and, as to such aliens, they are not considered by the order as visiting this country temporarily for business under an exemption enumerated in the immigration law, and they are regarded as aliens of the immigrant class pure and simple as distinguished from nonimmigrants.

I think the order, to which the relators have objected, has the warrant of law, for by Title 8, chap. 6, sec. 102, U. S. C. A., power is expressly conferred upon the Commissioner General of Immigration, under the direction of the Secretary of Labor, to establish rules and regulations not inconsistent with the law, to effectively carry out the immigration act and its object and purposes. I discover no inconsistency in the order, and the aliens, by its issuance, in my opinion, are not deprived of any rights accorded them by the immigration act. That they are "immigrants" is plainly apparent from the definition which Congress gives the term. Title 8, chap. 6, sec. 203, U. S. C. A., and the exception (sub. 2) does not mean that a daily workman or employee of the alien class, retaining his residence in foreign contiguous territory, is permitted to pursue an ordinary vocation for a wage, or that he comes here temporarily for business, trade, or commerce. To come for business, within the meaning of the statute, indicates a temporary purpose to engage in a business transaction, as that of a merchant, or one engaging in traffic or trade. Congress did not use the word "business" in its broadest sense, or in a sense including daily labor or an occupation, trade, or calling for hire. It had in mind a restriction of the broad term "business," as is
39 clearly manifest from the general scope and purpose of the act. The relators, under the order, were classified, or fall within the classification or grouping of quota immigrants, and before the examining tribunal or board they were required to prove that they were not subject to exclusion. Their hearing was fairly conducted and they were not subject to admission without first having procured an unexpired immigration visa. (Sec. 13, immigration act.)

The support of the contended invalidity of the order, however, also proceeds on the theory that, as to relator Cook, a subject of Great Britain, article 3 of the Jay treaty of 1794 between Great Britain and the United States applies and establishes her right to "freely pass and repass by land or by navigation into the respective territories and countries, * * * and freely carry on trade and commerce with each other." It is deemed unnecessary to define the scope of article 3 of the Jay treaty, or to hold that it is repealed or modified by legislative enactment, although in ex parte Gin Kato, 270 Fed. 343, where it was contended that early treaty stipulations with Japan were in conflict with the immigration act of 1917, it was held in unqualified terms that Congress has the right to exclude or deport

aliens in its discretion as an inherent right of sovereignty, and that it is the duty of the court to follow the last expression of the law-making authority. See also Cherokee Tobacco case, 11 Wall. 616; U. S. Gue Lim, 176 U. S. 459; Fong Yue Ting v. U. S. 149 U. S. 720. Though the Jay treaty, it is strongly urged, protects Miss
40 Cook from exclusion, I nevertheless, assuming art. 3 to be still in force, think that it can not be considered as including British subjects not born in Canada, whose status is that of immigrants and who seek to cross the border solely to labor here or to seek employment at trades or avocations without establishing a domiciliary status, as provided by the immigration act of 1924. The relators were not passing from one country to another to carry on trade or commerce, as those terms are ordinarily understood, but, as pointed out, simply to work for a daily wage, crossing back to their homes in Canada in the evening and returning in the morning, and such free passing and repassing was not contemplated by the Jay treaty or by Congress in the enactment of the immigration act.

I conclude that order No. 86 is a valid regulation and requires that the relators, before entering, must have an immigration visa, and that they come from contiguous territory to seek employment or to work for a wage, does not change their classification as immigrants.

Other questions argued at the bar have been considered, but may be passed as unsubstantial and without further discussion.

The writ of habeas corpus, heretofore issued, is dismissed and both relators remanded to the custody of the immigration officials for exclusion to the country of which they are residents.

Dated, December 23rd, 1927.

JOHN R. HAZEL, *U. S. D. J.*

41 In United States District Court

UNITED STATES OF AMERICA ON THE PETITION OF PRESTON M. ALBRO, on the relation of Mary Cook and Antonio Dancelon, Relators

against

ARTHUR J. KARNUTH, ACTING DISTRICT DIRECTOR OF IMMIGRATION, et al., respondents

Order dismissing writ

This matter having come on to be heard on the 2nd day of December, 1927, and adjourned dates, and having been duly argued by Preston M. Albro, of counsel for relators, and by Richard A. Grimm, United States attorney, for respondents, and the court having filed its decision and opinion in the premises on the 23rd day of December, 1927, now upon motion of Richard A. Grimm, Esq., of counsel for respondents, it is

Ordered that the writ of habeas corpus herein be and the same is hereby discharged and the relators remanded to the custody of the respondent. Pending appeal the relators may be paroled in custody of Preston M. Albro, of counsel.

Let this order be entered nunc pro tunc as at December 23, 1927.

Dated at New York, N. Y., this 4th day of January, 1928.

JOHN R. HAZEL, *U. S. D. J.*

42 In United States District Court

[Title omitted.]

Petition for appeal

The petitioner, Preston M. Albro, feeling aggrieved by the order and judgment made on the 23rd day of December, 1927, by this court, denying the writ of habeas corpus herein, does hereby appeal from the said order and decision of this court to the United States Circuit Court of Appeals for the Second Circuit, and prays that this appeal may be allowed and that a transcript of the record of proceedings and papers upon which the said order and decision was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, December 24, 1927.

BOTSFORD, MITCHELL, ALBRO & WEBER,
Attorneys for Relators.

Office and P. O. Address, 925 Manufacturers & Traders Building, Buffalo, New York.

To:
United States Attorney for the Western District of New York, attorney for respondents.
Clerk, U. S. District Court, Western District of New York.

43 In United States District Court

[Title omitted.]

Assignment of error

Now comes the petitioner in the above-entitled cause and files the following assignment of errors upon which he will rely upon the prosecution of the appeal in the above entitled cause from a decree made and entered herein by this court on the 23rd day of December, 1927.

The court erred in dismissing the writ of habeas corpus and remanding the aliens to the custody of the inspector in charge at the Immigration Service, Buffalo, New York, for the following reasons:

1. Because the aliens intending to enter the United States in the morning for work to return in the evening to their homes in Canada, were not immigrants but were non-immigrants.

2. Because the aliens being British subjects domiciled in Canada were entitled to cross and recross the border under the provisions of the Jay treaty of 1794.

3. Because the aliens are expressly exempted from the definition "immigrants" in the immigration act of 1924 by the provisions of subdivision 2 of section 3.

4. Because the immigration officials excluded the aliens contrary to the law and contrary to the evidence produced and that therefore the hearing was arbitrary and unfair.

Whereas, by law, the said writ of habeas corpus should have been granted and the aliens should have been released, the said Preston M. Albro prays that for the errors aforesaid and other errors in the record and proceedings the judgment and decision aforesaid made on the 23rd day of December, 1927, may be reversed and for naught held and esteemed, and that the writ of habeas corpus herein be granted and the aliens released, and for such other and further relief as may be proper in the premises.

Dated, New York, December 24, 1927.

BOTSFORD, MITCHELL, ALBRO & WEBER,
Attorneys for Appellants,
926 Manufacturers & Traders Building, Buffalo, New York.

45 In United States District Court

[Title omitted.]

Order allowing appeal

On reading the petition of Preston M. Albro, made in behalf of the aliens detained, dated December 24, 1927, for appeal and consideration of the assignment of errors presented therewith, it is

Ordered that the appeal herein be allowed as prayed for; and it is

Further ordered that a certified copy of the transcript of the record and all proceedings be transmitted to the Circuit Court of Appeals for the Second Circuit.

Dated, New York.

MANTON, *U. S. C. J.*

46-47 In United States District Court

Citation

[Citation in usual form, omitted in printing.]

48 In United States District Court

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a correct transcript of the record said district court in the above-entitled matter as agreed on by the parties.

Dated at Buffalo, N. Y., this 10th day of January, 1928.

BOTSFORD, MITCHELL, ALBRO & WEBER,
Attorneys for Relators.

RICHARD H. TEMPLETON, *U. S. Attorney,*
By RICHARD A. GRIMM, *Asst. U. S. Attorney,*
Attorneys for Respondents.

[Clerk's certificate to foregoing transcript omitted in printing.]

49 In United States Circuit Court of Appeals for the Second Circuit

No. 274—October Term, 1927

Argued February 17, 1928. Decided March 5, 1928.

UNITED STATES, ON PETITION OF PRESTON M. ALBRO, ON RELATION OF Mary Cook and Antonio Danelon, relators-appellant

v.

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF IMMIGRATION, AND Charles Dreher, inspector in charge United States Immigration Service, respondent-appellees

Appeal from the District Court of the United States for the Western District of New York.

Before MANTON, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

Opinion

Writ of error to the District Court for the Western District of New York. Relators sued out a writ of habeas corpus, reviewing an order of the board of special inquiry excluding them from the United States. Writ dismissed; relators appeal. Reversed.

Botsford, Mitchell, Albro & Weber, of Buffalo, N. Y. (Preston M. Albro, of Buffalo, N. Y., of counsel), for appellants.

Robert A. Reid, of Toronto, Canada, D. C. L. Barrister, amicus curiæ.

Richard H. Templeton, U. S. Atty., of Buffalo, N. Y. (Richard A. Grimm, Asst. U. S. Atty., of Buffalo, N. Y., of counsel), for appellees.

H. Ely Goldsmith, of New York City, consultant in immigration matters, amicus curiæ.

MANTON, Circuit Judge: Mary Cook, a British subject, and Antonio Danelon, a naturalized citizen of Canada and a British subject, sued out a writ of habeas corpus to review proceedings of the board of special inquiry of the Immigration Service, which held that they should be refused admission to the United States because they had no unexpired consular immigration visas, as required by the immigration act of 1924 (8 U. S. C. A. §§ 166, 167, 179, 201–226), and pursuant to rule 86 promulgated by the Department of Labor.

Danelon worked at Niagara Falls, but lived in the Dominion of Canada. Mary Cook, residing in the Dominion of Canada and intending to remain there, crossed the border, seeking employment in the United States. They were arrested on December 1, 1927. The court below dismissed the writ of habeas corpus, sued out by them, because (a) they were persons entering the United States, one looking for employment and the other solely to work, and each to return in the evening to an adjoining foreign country, and were not temporary visitors but were immigrants; (b) they were not protected as British subjects by the Jay treaty of 1794 (8 Stat. 116); and (c) in any event the Jay treaty does not apply to British nationals of other than Canadian birth and classified by Order 86 as immigrants.

Immigration act 1924 (§ 203, title 8, c. 6, U. S. C. A.) provides that—

"When used in this subchapter the term 'immigrant' means any alien departing from any place outside of the United States destined for the United States, except * * * an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure."

Section 102 of U. S. C. A., c. 6, tit. 8, provides that the commissioner having charge of the administration of the laws regulating the immigration of aliens into the United States shall make rules and regulations and prescribe such forms of bond, reports, entries, and other papers, and shall issue from time to time such instructions, not inconsistent with the law, as he shall deem best calculated for carrying out the provisions of this section and sections. Pursuant to that authority the commission issued General Order No. 86 on April 1, 1927, effective July 1, 1927, reading:

"(1) Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to secure employment in this country will not be considered as visiting the United States temporarily as tourists or temporarily for business or pleasure under any provision of the immigration law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the 'immigrant' class.

"(2) However, the following aliens of the said 'immigrant' class residing in foreign contiguous countries and who are now enjoying the border-crossing privilege may continue so to enjoy upon the payment of head tax, provided such head tax was assessable on aliens entering permanently at the time of original admission, and provided further, that they are not coming to seek employment."

The commissioner may not make regulations to enforce the immigration act which are beyond the powers delegated by Congress to him by section 102. The Parthian (C. C. A.), 276 F. 903. If the commissioner had lawful authority to issue order No. 86, it would prevent the relators crossing daily and classify them as immigrants. A question is presented as to whether these relators, domiciled in Canada, crossing, one for employment and the other seeking employment, are immigrants within the meaning of the immigration act. Were they temporarily in the United States for business, and what privileges are accorded to them by reason of the Jay treaty of 1794?

In Moffit v. United States (C. C. A.) 128 F. 375, in considering the immigration act of March 3, 1891 (26 Stat. 1084), the court had under consideration the importation of aliens under contracts or agreements to perform labor, and, holding that it clearly related to immigration, said that immigrants meant persons removing into the country for the purpose of permanent residence. The court held that, in considering the penalty imposed by section 10 of the act (26 Stat. 1086) on the master of a vessel for neglecting to detain on his vessel any alien who may unlawfully come to the United States on such vessel, or to return him to the port from which he came, must be construed in the light of such purposes and limited in its application to cases of alien immigrants. The court said, referring to the Standard Dictionary, that the meaning of the word "immigrant," as there defined, applied to the word used in the statute in order to describe the intent of Congress, and approved the definition that "immigrant" meant a person who removes into a country for the purpose of permanent residence or a person passing or removing into a country for the purpose of permanent residence. See, also, Ex parte Hoffman (C. C. A.) 179 F. 839; Taylor v. United States (C. C. A.) 182 F. 1.

Section 203, title 8, chapter 6, defines the term "immigrant" as meaning any alien departing from any place outside of the United States destined for the United States. In view of the common acceptation, or the definition, by standard dictionaries, of the term "immigrant," an alien destined for the United States must be deemed to have intended a change of his domicile and removal from the country of his domicile for the purpose of permanent residence. See Webster's Dictionary; Century Dictionary. And Congress excepted aliens visiting the United States temporarily for business or pleasure.

The appellee contends that business does not include ordinary occupation, but refers rather to trading and merchandising. Business has been defined as a very comprehensive term, and embodies everything by which a person can be employed, and, again, "that which occupies the time, attention, and labor of men for the purpose of livelihood or profit; but it is not necessary that it should be the sole occupation or employment. It embraces everything by which a man can be employed." Flint v. Stone-Tracy Co., 220 U. S. 107, 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; 9 Corpus Juris, 1101; Goddard v. Chaffee, 2 Allen (84 Mass.) 395, 79 Am. Dec. 796.

In United States v. Michigan Central R. R. Co. (C. C.)
51 48 F. 365, the railroad company employed in its office in New York, near the Canadian border, a resident of Canada, who came daily to his work in the United States. It was sued, under the contract labor law, for assisting and encouraging importation or migration of an alien, within the meaning of that law. Wallace, J., directing a judgment for the defendant, said:

"The several provisions of the act are directed against assisted immigrants, as well as those who prepay their transportation or encourage their migration or importation by previous contract. Blount was not an immigrant, because he did not come here intending to acquire a permanent or a temporary home. As he did not migrate here, the defendant did not encourage his 'migration.' He was not imported, nor did the defendant assist in his 'importation,' any more than he was exported, and assisted in his exportation, when he went home at night. It may be that such a case as this is within the mischief which the promoters of the law intended to remedy, but it is not within the ordinary import of the words of the statute. If every person who comes into this country migrates, or is imported, within the meaning of the statute, because he remains temporarily, and works here, the statute will reach many cases in which its application would be a manifest absurdity."

The Jay treaty of 1794 between the United States and Great Britain provides the right of free temporary passage across the Canadian border in article 3 (Treaty of Amity, Commerce, and Navigation, 1794.) Article 3 provides:

"It is agreed that it shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other."

By article 28 of that treaty it was provided that the first 10 articles of the treaty were to be permanent. In considering the intention of Congress, the terms of this treaty are pertinent. An act of Congress may supersede a prior treaty (The Cherokee Tobacco, 11 Wall. 616, 20 L. Ed. 227), and an irreconcilable conflict between the act of Congress and any treaty results in the last in date prevailing (Hijo v. United States, 194 U. S. 315, 24 S. Ct. 727, 48 L. Ed. 994). But the courts will be slow to assume that Congress intended to violate a treaty right. United States v. Mrs. Gue Lim, 176 U. S. 459, 20 S. Ct. 415, 44 L. Ed. 544; Chew Heong v. United States, 112 U. S. 536, 5 S. Ct. 255, 28 L. Ed. 770.

There is no question at bar as to the permanent immigration of aliens, nor have we questions of social welfare to our inhabitants which must be considered in the construction of this act of Congress. Where it is possible, in construing the statute, we should conform to

the provisions of the treaty. United States v. 43 Gallons of Whisky, 108 U. S. 496, 2 S. Ct. 906, 27 L. Ed. 803; Ward v. Race Horse, 163 U. S. 504, 16 S. Ct. 1076, 41 L. Ed. 244. Nowhere in the immigration act do we find this right, accorded by the treaty to Canadian citizens to pass and repass, which is allowed by the Jay treaty, taken from them; certainly not by expressed intent. The treaty and the immigration act do not seem inconsistent, but are reconcilable. This treaty was a mutual border-crossing right, accorded to the parties thereto and for their own special interest. The treaty was not terminated by the War of 1812. Soc. for the Propagation of the Gospel in Foreign Parts v. Town of New Haven, 8 Wheat. 464, 5 L. Ed. 662; Woolsey, International Law (6th Ed.) 1897, p. 263; Moore's Digest of International Law (1906), vol. 5, pp. 372, 383; U. S. ex rel. Diabo v. McCandless (D. C.), 18 F. (2d) 282.

The immigration laws have been deemed to include all conventions and treaties of the United States relating to immigration, exclusion, or expulsion of aliens. Terlinden v. Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. Ed. 534. The treaty provisions of a country must be construed so as to best conform to the accepted principles of international law and not in derogation of them. Vilas v. City of Manila, 220 U. S. 345, 31 S. Ct. 416, 55 L. Ed. 491. They should be liberally construed, so as to carry out the apparent intention of the contracting parties to secure equality and reciprocity between them. De Geofroy v. Riggs, 133 U. S. 258, 271, 10 S. Ct. 295, 33 L. Ed. 642; In re Ross, 140 U. S. 453, 475, 11 S. Ct. 897, 35 L. Ed. 581. Undoubtedly the plain intention of article 3 of the treaty and the explana-
32 tory article thereof was to give intercourse freely among the people of each country on both sides of the line or international boundary. Such commercial and friendly intercourse, together with the freedom of navigation and passage, is not inconsistent with the right of this Nation to debar aliens from admission to this country.

The term "immigrant" has an entirely different meaning, and the immigration statute an entirely different purpose. Nothing in the treaty nor, indeed, in the exception in section 203, which permits visiting the United States temporarily for business, places a limit as to time or frequency of passing. It is obvious that both intended to observe the freedom of mutual international intercourse for their subjects in order to engage in business and commerce and to carry on trade. Moreover, the supplemental agreement of 1796 (8 Stat. 130) was made permanent by the nations. Society, etc., v. New Haven, supra; Kent's Commentaries on International Law (Abdys' Ed.) p. 394.

This treaty was intended for the benefit of all British subjects. Shanks v. Dupont, 3 Pet. 241, 7 L. Ed. 666. It is intended to make effective the purposes of the high contracting parties and should receive a reasonable construction, with a view to giving a fair operation to the whole. Sullivan v. Kidd, 254 U. S. 433, 41 S. Ct. 158, 65 L. Ed. 344; Missouri v. Holland, 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984. The treaty has been considered in

force and effect since 1812. Jackson v. Clarke, 3 Wheat. 1, 4 L. Ed. 319 (1818); Hughes v. Edwards, 9 Wheat. 489, 6 L. Ed. 142 (1824); Shanks v. Dupont, 3 Pet. 241, 7 L. Ed. 666 (1830).

Because the relators were not immigrants within section 203, and were within the exception of that section, they were both permitted to enter the United States temporarily for their respective business, one to work and the other seeking employment. At no time did they intend to remain permanently in the United States or seek to migrate here. Moreover, the treaty effective at the time of their crossing and recrossing gave them, as British subjects, privileges accorded under the explanatory note of article 3 of the treaty of 1794, which included that of crossing and recrossing for the purpose of business and commerce, and such they were engaged in. The writs should have been sustained and their discharge granted.

Order reversed.

53 In United States Circuit Court of Appeals, Second Circuit

UNITED STATES EX REL. PRESTON M. ALBRO, RELATOR-APPELLANT

v.

ARTHUR J. KARNUTH ET AL., RESPONDENTS-APPELLEES

Decree

Filed March 12, 1928

Appeal from the District Court of the United States for the Western District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the order of said district court be and it hereby is reversed.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

54 Indorsed: United States Circuit Court of Appeals, Second Circuit. U. S. ex rel Preston M. Albro v. A. J. Karnuth et al. [File indorsement omitted.]

55 [Clerk's certificate to foregoing transcript omitted in printing.

56 Supreme Court of the United States

Order revoking order denying certiorari

On consideration of the petition for rehearing filed herein,
It is now here ordered by this court that the said petition be, and the same is hereby, granted. The order heretofore entered denying the petition for a writ of certiorari in this case is revoked, and a writ of certiorari herein is granted.
November 19, 1928.

57 Supreme Court of the United States

Order allowing certiorari

Filed November 19, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.
[Indorsement on cover:] File No. 33,507. U. S. Circuit Court of Appeals, Second Circuit. Term No. 198. Arthur J. Karnuth, United States director of immigration, and Charles Dreher, inspector in charge United States Immigration Service, petitioners, vs. United States of America, on the petition of Preston M. Albro, an attorney, for Mary Cook and Antonio Danelon. Petition for writ of certiorari and exhibit thereto. Filed June 12th, 1928. File No. 33,507.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. ——

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF Immigration, and Charles Dreher, Inspector in Charge United States Immigration Service, petitioners

v.

UNITED STATES OF AMERICA, ON THE PETITION OF Preston M. Albro, an Attorney, for Mary Cook and Antonio Danelon

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Arthur J. Karnuth, United States Director of Immigration, and Charles Dreher, Inspector in Charge United States Immigration Service, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on March 12, 1928.

QUESTIONS PRESENTED

1. Is a Canadian citizen residing in Canada, but employed in the United States, and who crosses the

boundary daily in passing from his home to his work, returning at night, an alien "visiting" the United States "temporarily for business," and therefore not an immigrant within the meaning of Section 3 of the Immigration Act of 1924, and not required to present an immigration visa as a condition to being allowed to enter the United States?

2. Notwithstanding later immigration legislation, may British citizens residing in Canada enter the United States under the Jay treaty of 1794 between the United States and Great Britain, which provided that—

> it shall at all times be free to His Majesty's subjects, and to the citizens of the United States * * * freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America * * *?

STATUTE, REGULATIONS, AND TREATY

Section 3 of the Immigration Act of 1924 (c. 190, 43 Stat. 153, 154; U. S. C., Title 8, Sec. 203), provides:

> When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except * * *. (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure * * *.

General Order No. 86, dated April 1, 1927, prescribed by the Commissioner General of Immigra-

tion with the approval of the Secretary of Labor, provides:

> SUBJECT: Land border crossing procedure.
>
> 1. Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to seek employment in this country will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the "immigrant" class.
>
> 2. However, the following aliens of the said "immigrant" class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessable on aliens entering permanently at the time of original admission and, provided further, that they are not coming to seek employment.

Article III of the Jay Treaty of 1794, 8 Stat. 116, 117 (1 Malloy's Treaties, etc., 590, 592), between the United States and Great Britain provides:

> It is agreed that it shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties on the continent of America * * *

and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other. * * *

STATEMENT

The respondents, Mary Cook and Antonio Danelon, British subjects, sought admission to the United States from Canada on December 1, 1927. Neither was born in Canada. At a hearing before the Board of Special Inquiry, the respondent Mary Cook testified that she is a native of Scotland, and came to Canada in May, 1924. She resides in Niagara Falls, Ontario, and came to Buffalo to "look for a job," intending to return to her home in Canada each night. (R. 3–4, 21–25.) The respondent Antonio Danelon testified before the Board of Special Inquiry that he was born in Italy, came to Canada in 1923, and there became a Canadian citizen in 1924 by virtue of his father's naturalization. Since November, 1926, he has been employed by the United States Lighting and Heating Corporation at Niagara Falls, New York, crossing the boundary daily to engage in his work, and to return therefrom. When detained by the immigration authorities he was on his way to such employment, and intended to return, as was his custom, to his home in Niagara Falls, Ontario, that evening. (R. 4, 9–15.)

The respondent Mary Cook had never applied for an immigration visa (R. 23), but the respondent Antonio Danelon had applied for and had been

refused a visa (R. 13). After hearing, both aliens were excluded from admission on the ground that they were not in possession of an unexpired consular immigration visa required under the Immigration Act of 1924. (R. 17, 28.)

The respondents thereupon sued out a writ of habeas corpus, alleging in substance that they were unlawfully detained by the immigration authorities in that they were "nonimmigrants" and thus entitled to enter as aliens visiting the United States temporarily for business. (R. 3–6.) After hearing, the District Court for the Western District of New York dismissed the writ, because (*a*) they were not "nonimmigrants" visiting the United States temporarily for business but "immigrants" within the meaning of the Immigration Act of 1924, and that, therefore, the Secretary of Labor lawfully could prescribe the regulations contained in General Order No. 86; (*b*) that they were not protected as British subjects by the Jay Treaty of 1794; and (*c*) in any event the Jay Treaty does not apply to British nationals of other than Canadian birth. (R. 30–40.)

On appeal the Circuit Court of Appeals reversed the order of the District Court, holding in substance that the respondents were "nonimmigrants" under Section 3 (2) of the Immigration Act of 1924 because they were aliens visiting the United States temporarily for business; and that under the Jay Treaty of 1794 they were privileged to cross and recross the border for the purpose of business

and commerce, and such they were engaged in. (R. 49–53.)

SPECIFICATION OF ERRORS TO BE URGED

The errors which the petitioners urge as ground for the granting of the writ of certiorari and for the reversal of the judgment of the Circuit Court of Appeals for the Second Circuit are:

1. The court erred in reversing the order of the trial court.

2. The court erred in holding that the respondents were "nonimmigrants" under Section 3 (2) of the Immigration Act of 1924 as aliens visiting the United States temporarily for business.

3. The court erred in holding that the respondents were entitled to admission to the United States under the provisions of the Jay Treaty of 1794.

REASONS FOR GRANTING THE WRIT

1. The case is one of importance in the administration of the immigration laws. There is ground to contend that the intention of Congress as indicated by the circumstances which led to the enactment of the Immigration Act of 1924 and the provisions of the Act itself justify the regulations attacked and the construction of the Act of 1924 that such persons are immigrants.

2. The problem presented by the instant case is apparently a serious one in the administration of the immigration laws, and although the construction of the applicable statutes and treaties by the Circuit Court of Appeals is supported by respect-

able authority the question is not free from doubt. We have endeavored fairly to present the issues involved in the brief in support of this petition.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

JUNE, 1928.

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BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

The opinion of the District Court will be found on pages 30–40 of the record. The opinion of the Circuit Court of Appeals (R. 49–53) is reported in 24 F. (2d) 649.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on March 12, 1928. (R. 53.)

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

The facts have been stated above in the petition Some other statutes and regulations are set forth in the appendix.

ARGUMENT

The main question is whether aliens residing in Canada and crossing the boundary daily to engage in labor or employment in the United States, returning to their homes at night, are immigrants within the meaning of the Act of 1924.

Section 3 of that Act defines as an immigrant an "alien departing from any place outside the United States destined for the United States," with certain exceptions. The only exception bearing on this case is of an—

> alien visiting the United States temporarily as a tourist or temporarily for business or pleasure.

The respondents were aliens departing each day from a place outside of the United States "destined for the United States," and are therefore immigrants unless their coming daily to the United States for work amounts to "visiting" the United States "temporarily for business."

If they are immigrants, they must present immigration visas. If born in Canada, they are not subject to the quota (see Section 4 (c), Immigration Act of 1924), and may obtain a visa on showing that they have the mental, moral, and physical qualifications required by the immigration laws. If not born in Canada, even though British subjects, they may not obtain visas unless in compliance with the quota provisions of the Act of 1924.

For nearly three years after that Act was passed, aliens residing in Canada were allowed to cross daily to work, on the theory that they were not immigrants.

Prior to the promulgation on April 1, 1927, of General Order No. 86, above quoted, the following regulations were in effect:

Rule 1, Subdivision K, of the Immigration Rules of March 1, 1927, provided:

> PARAGRAPH 1. The head tax shall not be levied in respect of the following classes of aliens: * * *
>
> (*f*) Aliens who, without taking up residence in the United States, habitually cross and recross the land boundaries and who hold the identification card prescribed in paragraph 1, subdivision Q of Rule 3.

Rule 3, Subdivision Q, provides:

> With a view to avoiding delays and embarrassment in cases of aliens and citizens who, residing upon either side of the line, habitually cross and recross the boundary upon legitimate pursuits, an identification card will be furnished such persons upon application to the immigration official in charge at the place of ingress and egress. * * *

On April 1, 1927, by General Order No. 86, issued by the Department of Labor, aliens residing in Canada and crossing daily to work were classified as immigrants within the meaning of the Act of 1924. This new construction of the Act resulted from protests of labor organizations against the cheap labor thus obtaining occupation in the United States and from protests of employers too far from the boundary to be able to employ such cheap labor, and who suffered in competition with those employers near the boundary engaged in similar kinds of business.

Since the order of April 1, 1927, went into effect it has been generally complied with by native-born Canadians, as they obtain visas, on showing their physical, mental, and moral qualifications, without regard to the quota, and are thereupon supplied with identification cards, but aliens not Canadian born, such as these respondents, can not obtain visas unless within the quota, and that is where the shoe pinches.

If the respondents are not immigrants, but temporary visitors for business purposes, they may enter without visas by virtue of Executive Order No. 4476 (Immigration Rules, March 1, 1927, pp. 88, 89)—by which—

> citizens of Canada * * * and British subjects domiciled therein * * * may * * * enter the United States temporarily without passports or visas.

The reasons for the opinion that aliens residing in Canada and coming across the boundary daily to work are persons visiting the United States temporarily for business and not immigrants are well stated in the opinion of the Circuit Court of Appeals. (R. 49–53.) That court says that the word "immigrant" is commonly understood to mean an alien who comes to the United States for permanent residence, and that the word "business" as used in the Act of 1924 is broad enough to include working for wages or salary.

It must be admitted that the decision below has much to support it, and the fact that the Depart-

ment of Labor so construed the Act of 1924 from its passage until April 1, 1927, is not to be overlooked.

On the other hand, if persons in the situation of respondents are not immigrants and not subject to the restriction of the immigration laws, aliens who can not comply with any of the requirements of those Acts may be permanently employed in the United States, and this results in influx of cheap labor along the boundary which the immigration laws are designed to prevent. Many aliens inadmissible under the Immigration Acts, who gain access to Canada and reside near the border are allowed, under the decision below to engage continuously in employment in the United States, and this without payment of the head tax required by Section 2 of the Act of 1917 of every alien entering the United States, except those who enter—

> after an uninterrupted residence of at least one year immediately preceding such entrance in the Dominion of Canada * * * for a temporary stay.

So far as the Jay Treaty is concerned, the section we are now concerned with may well have been abrogated by the war of 1812 if other sections were not, and in any event will be considered modified by subsequent Acts of Congress inconsistent therewith, but if the provisions of the treaty pertinent thereto were not abrogated by war, the Immigration Acts should not be construed to repeal the Treaty, if that result reasonably may be avoided.

For a discussion of the events and negotiations leading up to the conclusion of the Jay Treaty, attention is called to the work entitled "Jay's Treaty, a Study in Commerce and Diplomacy," by Samuel Flagg Bemis (MacMillan, New York, 1923). It is sufficient in the present discussion to say that nothing has been discovered in the history of the Treaty to support the view that it was designed to cover admission to either Canada or the United States of the nationals of the other for the purpose of permanent employment. The phraseology of Article III itself and the negotiations leading up to its adoption indicate that it relates to trade and commerce between the United States and Canada. Its sole object was evidently to promote free commercial intercourse across the Canadian border. This view is sustained by the views expressed by John Jay, who conducted the negotiations for the United States, in his letter of November 19, 1794, to Secretary of State Randolph, in which he said:

> The third article will, I presume, appear to you in a favorable light; a number of reasons which, in my judgment, are solid, support it. I think they will, on consideration, become obvious. It was proposed and urged that the commercial intercourse opened by this article ought to be exempted from all duties whatever on either side. The inconvenience which we should experience from such a measure were stated and examined; it was finally agreed to subject it to native

duties. (American State Papers, Foreign Relations, Vol. I, p. 503.)

It has been a disputed question as to whether the War of 1812 between the United States and Great Britain terminated in whole or in part the Jay Treaty of 1794. On the question see American State Papers, Foreign Relations, Vol. IV, pages 354–355, 357; Moore's International Law Digest, Vol. V, par. 779; Footnotes on pages 580 and 590, Malloy's Treaties, etc., Vol. 1, and cases cited.

Many of the cases cited in the above authorities relate to land tenure and other rights which vested under the Jay Treaty. No case has been discovered with reference to the right of immigrants under the Jay Treaty, except *McCandless* v. *United States ex rel. Diabo* (March, 1928, C. C. A. 3), 25 F. (2d) 71, relating to the right of Canadian Indians to enter the United States under the Jay Treaty.

CONCLUSION

We have tried to set forth as briefly as possible the questions presented and the respective contentions. We can not say that the position of the petitioners is a strong one, and unless it appeals to the Court as having sufficient substance to afford a substantial prospect of reversal there is nothing to be gained by a review on certiorari.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

JUNE, 1928.

APPENDIX

STATUTES AND REGULATIONS

Section 3 of the Immigration Act of 1917 (c. 29, 39 Stat. 874, 875, 876; U. S. C. Title 8, Sec. 136) provides:

> That the following classes of aliens shall be excluded from admission into the United States: * * * persons hereinafter called contract laborers, who have been induced, assisted, encouraged, or solicited to migrate to this country by offers or promises of employment, whether such offers or promises are true or false, or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled; * * *.
>
> * * * * * *
>
> * * * *Provided further,* That skilled labor, if otherwise admissible, may be imported if labor of like kind unemployed can not be found in this country, and the question of the necessity of importing such skilled labor in any particular instance may be determined by the Secretary of Labor upon the application of any person interested, such application to be made before such importation, and such determination by

the Secretary of Labor to be reached after a full hearing and an investigation into the facts of the case: *Provided further,* That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, nurses, ministers of any religious denomination, professors for colleges or seminaries, person belonging to any recognized learned profession, or persons employed as domestic servants * * *.

The applicable provisions of the Immigration Act of 1924 (c. 190, 43 Stat. 153, 154, 155, 161, 166; Su. U. S. C. 8, Secs. 203, 205, 213, 222, 223), are:

SEC. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except * * * (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure * * *.

SEC. 4. When used in this Act the term "non-quota immigrant" means—

* * * * *

(c) An immigrant who was born in the Dominion of Canada * * *.

SEC. 5. When used in this Act the term "quota immigrant" means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant * * * by reason of being excepted from the operation

of any other law regulating or forbidding immigration.

SEC. 13. (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent, (2) is of the nationality specified in the visa in the immigration visa, (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws.

* * * * *

SEC. 24. The Commissioner General, with the approval of the Secretary of Labor, shall prescribe rules and regulations for the enforcement of the provisions of this Act; but all such rules and regulations, in so far as they relate to the administration of this Act by consular officers, shall be prescribed by the Secretary of State on the recommendation of the Secretary of Labor.

SEC. 25. The provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this Act. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien, although admissible under the pro-

> visions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act.

Paragraph 48 of General Instruction Consular, No. 926, prescribed September 30, 1925, by the Secretary of State in accordance with Section 24 of the Immigration Act of 1924, provides (p. 14):

> Temporary visits, except under rule 8 of the Immigration Rules, July 1, 1925, for the purpose of performing labor for hire are not considered to be within the purview of section 3 (2) of the act. However, personal servants accompanying their employers who are tourists or business men visiting the United States on a temporary visit and leaving with them might be granted passport visas under this section.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 198

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF Immigration, and Charles Dreher, Inspector in Charge, United States Immigration Service, Petitioners

v.

UNITED STATES OF AMERICA, ON THE PETITION OF Preston M. Albro, an Attorney, for Mary Cook and Antonio Danelon

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Arthur J. Karnuth, United States Director of Immigration, and Charles Dreher, Inspector in Charge, United States Immigration Service, respectfully petition the Court to set aside the order of October 8, 1928, denying the petition for a writ of certiorari herein and to reconsider the petition.

As ground for petition for rehearing, your petitioners respectfully state that the denial of said petition for certiorari leaves in effect the decision of the Circuit Court of Appeals for the Second Cir-

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cuit holding that an Article in the Treaty of 1794 between the United States and Great Britain is still in force, for which reason the decision is of serious and far-reaching effect upon the administration of the three main statutes of the United States so far as concerns the control of and check upon the entry of aliens into the United States across the boundary between the United States and Canada. This decision will have consequences of grave public importance which were not perceived at the time the petition for writ of certiorari herein and supporting brief were filed in this Honorable Court.

A further ground for petitioning for a rehearing of the petition is that it also now has been found that the consequence of the decision of the Circuit Court of Appeals in its holding as to what constitutes an alien visiting the United States temporarily for business was not sufficiently emphasized in the petition and supporting brief, a construction of law which, it appears, will have disastrous results upon the immigration laws regulating the entrance of aliens into the United States not alone across the Canadian border but across the Mexican border and at seaports of the United States as well.

The Circuit Court of Appeals in its opinion (R. 52) flatly declares that the Jay Treaty of 1794 was not terminated by the War of 1812. This well may be, and yet the particular article in question be abrogated by that war. In view of the fact that mutual rights were granted by Article III to British subjects and American citizens, as well as

to Indians dwelling on either side of the border, it reasonably might appear that any question regarding whether the treaty is in force and effect is a political and not a judicial one, since rights of citizens of both Great Britain and the United States are involved and the ruling of the Circuit Court of Appeals accords the privilege of free passing to persons residing in Canada without any regard to whether the same right is granted to residents of the United States, a matter which properly could not be brought out in the record in the instant case. Many of the cases cited by the court in support of its decision on this point relate to property and other rights vested under the treaty, prior to the War of 1812, and are not in point in the matter at issue. The only case cited which might be in point is *McCandless* v. *United States ex rel. Diabo*, 25 F. (2) 71, March 9, 1928, which held that North American Indians had a right under the treaty to cross the Canadian border into the United States. A review of that case by this Honorable Court was not sought because that question became moot as to Indians by reason of the passage of special legislation on April 2, 1928 (c. 308, 45 Stat. 401), which recognized that right.

While the court referred only to the Treaty of 1794, it is a fact that subsequent to that treaty and the War of 1812, the Treaty of Ghent of 1814 (8 Stat. 218, 222), in Article IX thereof, "restored" to the Indians the rights which they had prior to the war, but this treaty did not "restore" any rights to

other British subjects in Canada. The fact that the Treaty of Ghent thus "restored" rights only to the Indians distinguishes that case from the instant case and is evidence that both countries recognized that this article of the Treaty of 1794 had been abrogated by the War of 1812. This point seems not to have received the consideration of the Circuit Court of Appeals in its decision, which affects not only the Department of the Government charged with the administration of the immigration laws, but the Department charged with the conduct of our foreign relations. As a consequence of the decision as it now stands it is respectfully pointed out that not only British subjects of the white and black races, but also of the Oriental races, can enter Canada and immediately gain admission to the United States for practically an indefinite period without regard to the immigration laws which forbid the admission as immigrants of persons ineligible for citizenship. In fact, it follows that persons of any nationality must be admitted to the United States under this decision without regard to the immigration laws so soon as they become lawfully domiciled within Canada and thereby become British subjects. It is inconceivable that Congress in providing for treaty obligations in Section 3 (2) and Section 3 (6) of the Act of May 26, 1924, intended such result, as it is apparent that in its definition of the word "alien" in the Immigration Acts of 1917 and 1924 the admissibility of all aliens to the United States must

be determined under those laws and no special exemption was to be accorded British subjects under the Treaty of 1794. (Page 4, Report 350, Committee on Immigration and Naturalization, House of Representatives, first Session, 68th Congress, to accompany H. R. 7995, which became the Immigration Act of 1924.)

It would also appear to follow that if the decision of the Circuit Court of Appeals is to remain in effect the Acts of Congress which authorize passports and visas to be required of aliens would be unenforceable and without effect with respect to aliens domiciled in Canada but owing permanent allegiance to Great Britain, although for several years an Executive Order issued under such Acts of Congress, upon the recommendation of the Secretary of State, has required passports and visas in such cases as a condition to enter.

It is respectfully submitted that the decision of the Circuit Court of Appeals as to the effect of the Treaty of 1794 on the immigration laws is one which justifies the consideration of this Honorable Court for the reason that if under the facts of the instant case the treaty is in force and effect it was unnecessary for that court to consider the other point involved in the case as having any material bearing on the rights of the petitioners to admission to the United States. If the treaty rights granted under Article III are no longer in force by reason of the War of 1812 and the failure to restore such rights to British subjects in the Treaty of Ghent of

1814, or by reason of the enactment by Congress of immigration laws which seem to be in hopeless conflict with the Treaty of 1794, it is of general public importance that the question be settled by this Honorable Court so that orderly administration of the immigration and passport laws may follow and their provisions be effective.

It is fair to state that while Section 15 of the Immigration Act of 1924 gives authority to exact a bond to insure that an alien admitted to the United States for a temporary period shall depart at the end of his stay there is some doubt that power exists to exact such bond in the class of cases involved under the decision of the Circuit Court of Appeals if that part of its decision is sound that the Treaty of 1794 is in force and effect, as it seems unreasonable to hold that the Government has any power to restrict the treaty right freely to pass and repass the border by insisting on bond to insure departure. Inability to furnish bond or attempt by administrative officers to make the bond so high as to be prohibitive would serve to prevent enjoyment of the treaty right, and under the court's decision the attempt to exact bond would appear to be an illegal exercise of power. Without the Government having the protection of a bond experience indicates that a large number of aliens admitted for temporary stay would disappear into the interior of the United States, to remain here unlawfully.

The decision of the Circuit Court of Appeals on the other point in the case is that an alien who is a Canadian citizen residing in Canada and who seeks to enter the United States to work each day in the United States, or to look for work in the United States, returning each night to his home in Canada, his employment in the United States to be permanent and indefinite in duration, is within the meaning of Section 3 (2) of the 1924 Immigration Act an exception to the definition of the term "immigrant" as used in that section in that he is "visiting the United States" "temporarily for business."

In solving this question the Circuit Court of Appeals first gave much consideration to cases which discussed the meaning of the word "immigrant" in reference to Immigration Acts other than the Immigration Act of 1924, as well as to the meaning accorded that word by the lexicographers, and thus read into that term at the outset the element of immigration for permanent residence. This appears unnecessary and unwarranted for the reason that that element is not included in the definition of the word "immigrant" in the Immigration Act of 1924. The term is defined in Section 3 of that Act as meaning "any *alien* departing from any place outside the United States destined for the United States," the term "alien" being defined in Section 28(b) as including "any individual not a native-born or naturalized citizen of the United States," excepting only from this definition Indians of the United

States not taxed and citizens of the islands under the jurisdiction of the United States.

In deciding that the aliens involved in this case are within the exception to the term "immigrant," defined in subdivision 2 of Section 3, the Circuit Court of Appeals gave the broadest possible construction to the word "business." It is unquestioned that one of the purposes of the immigration laws is to protect the people of the United States from the influx of peoples of other races and nationalities with living standards lower than our own. To accord to the term "visiting the United States temporarily for business" a meaning so broad as to bring consequences which conflict with the plain intent of Congress would appear to be unwarranted and unjustified, because, at the most, on its face the term seems to be used to comprehend such a reference to trade and commerce not specifically covered by the usual treaty provisions regarding commerce and navigation.

It does not appear unreasonable to assume that the "business" referred to in the Act must have its origin or inception in that country from which the alien departs for the United States, or be business between the two countries. The construction placed by the Secretary of Labor upon this clause in the Act as applied to the petitioners is one calculated to interfere the least with ordinary trade and commerce originating in Canada, and the passage of aliens across the border in legitimate business, whereas the construction of the Circuit Court of

Appeals if carried to a conclusion would require the examination of every alien of this class each morning and another examination again on departure in order to carry out the head tax and other requirements of the immigration laws. The method adopted by the administrative officers being a sensible and practical one and not arbitrary or capricious, it would appear that the Departmental regulation is justified under a fair construction of the intent of Congress as expressed in the law.

In another respect it would appear to be proper for this Honorable Court to consider the consequences of the decision of the Circuit Court of Appeals on this point. The record shows that one of these aliens was applying for daily admission to work at employment of a permanent nature and not to a new job each day. If the decision be permitted to stand, it would follow that any alien seeking to enter the United States at any port of entry for the purpose of working or engaging in labor of any kind, whether the job be of temporary or permanent duration, or to look for work, must be permitted to enter if he shows that he intends to depart, for instance, at the end of each week, or each month, or at the end of each six months or even less often. The period of stay would depend only upon a fair construction of the term "temporary," and a reentry could be gained immediately thereafter under the same conditions and repeated times without number, without regard for quota

and visa restrictions, so that his job in this country practically would be of permanent duration. Having to depart only so often that the stay can be considered temporary, say every six months, a great influx of foreign labor into our interior cities is to be expected. This ingress into the interior of the United States would only be limited to the extent that the cost of transportation to the nearest border port at the end of each temporary period might be more than the laborers could afford.

The result of the decision is that not only are the gates thrown open at the Canadian border, but hordes of aliens can enter along the Mexican border and from the West Indies through ports in our southeastern States. In fact, under the court's construction of what constitutes an entry "temporarily for business," a way is open for the entry of laborers from those countries unrestricted except for the fact that a reasonable bond may be exacted to insure departure at the end of the temporary stay. It is unthinkable that Congress intended such a situation or that any fair and reasonable construction of the language used by Congress, bearing in mind the manifest intent of the immigration laws, warrants such construction as that adopted by the Circuit Court of Appeals for the Second Circuit.

In view of the consequences stated which reasonably may be expected to follow the broad construction given by the Circuit Court of Appeals to the

term "temporarily for business," it would seem to be the duty of the Government to give the strictest possible construction to the decision of the court. That course will undoubtedly result in a multiplicity of suits on the part of persons interested in extending the scope of the court's decision in the broadest possible manner.

Furthermore, if the Circuit Court of Appeals is correct in holding that these aliens are admissible under the statutory exception relating to aliens coming to the United States temporarily for business, the court need not have decided whether the Treaty of 1794 was in force and effect and should have left that matter to the decision of the political branch of the Government.

The foregoing petition filed at the earnest request of the Department of Labor and prepared in that Department presents the case from the standpoint of those most familiar with the operation of the immigration laws and the effect of the decision of the court below.

Wherefore, your petitioners respectfully pray that a rehearing and a reconsideration of the petition for certiorari filed in this case be granted.

WILLIAM D. MITCHELL,
Solicitor General.

ALBERT E. REITZEL,
BART W. BUTLER,
Assistant Solicitors, Department of Labor.

NOVEMBER, 1928.

CERTIFICATE OF COUNSEL

The undersigned, counsel for the petitioners, hereby certify that the Petition for Rehearing of the Petition for Certiorari in this cause filed this day is presented in good faith and not for delay.

WILLIAM D. MITCHELL,
Solicitor General.

ALBERT E. REITZEL,
BART W. BUTLER,
Assistant Solicitors, Department of Labor.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 198

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF Immigration, and Charles Dreher, Inspector in Charge United State Immigration Service, petitioners

v.

UNITED STATES OF AMERICA, ON THE PETITION OF Preston M. Albro, an Attorney, for Mary Cook and Antonio Danelon

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

OPINIGN BELOW

The opinion of the District Court (R. 15) is not reported. The opinion of the Circuit Court of Appeals (R. 23) is reported in 24 F. (2d) 649.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 12, 1928. (R. 28.) The petition

for certiorari was filed June 12, 1928, and granted November 19, 1928. (R. 29.)

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION

Section 3 of the Immigration Act of 1924 defines an immigrant as—

> any alien departing from any place outside the United States destined for the United States, except * * * an alien visiting the United States * * * temporarily for business or pleasure.

The main question in this case is whether an alien who comes to the United States to perform labor for hire, or to seek such employment, is here for business within the meaning of the statute.

This case relates to aliens living in Canada and crossing the border daily to work, but the question is broader than that, and as a visit is considered temporary, although lasting for months, the decision will determine whether aliens coming here from contiguous or other foreign countries to work for periods of several months are here for business. The practical effect of holding that labor is business will be to allow aliens to enter and reenter temporarily to labor for hire as nonimmigrants and without regard to the quota limits established to protect American labor.

As bearing on the proper construction of the statute, questions arise whether Article III of the Jay Treaty of 1794, giving—

> to his Majesty's subjects, and to the citizens of the United States,

the privilege—

> freely to pass and repass by land or inland navigation, into the respective territories * * * and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other

is still in effect or was abrogated by the War of 1812, and whether, in any event, it was intended to do more than permit travel, trade, and commerce.

THE STATUTES AND REGULATIONS

The following are pertinent provisions of the Immigration Act of 1924 (c. 190, 43 Stat. 153; U. S. C. Title 8, Secs. 203–205, 207, 213, 222):

DEFINITION OF "IMMIGRANT"

> Sec. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes

in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

NONQUOTA IMMIGRANTS

Sec. 4. When used in this Act the term "nonquota immigrant" means—

* * * * *

(c) An immigrant who was born in the Dominion of Canada, Newfoundland, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America, and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him.

QUOTA IMMIGRANTS

Sec. 5. When used in this Act the term "quota immigrant" means any immigrant who is not a nonquota immigrant. An alien who is not particularly specified in this Act as a nonquota immigrant or a nonimmigrant shall not be admitted as a nonquota immigrant or a nonimmigrant by reason of relationship to any individual who is so specified or by reason of being excepted from

the operation of any other law regulating or forbidding immigration.

APPLICATION FOR IMMIGRATION VISA

Sec. 7. (a) Every immigrant applying for an immigration visa shall make application therefor in duplicate in such form as shall be by regulations prescribed.

(b) In the application the immigrant shall state * * * the purpose for which he is going to the United States; the length of time he intends to remain in the United States; whether or not he intends to abide in the United States permanently; * * *.

Sec. 13. * * *.

(b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

SEC. 24. The Commissioner General, with the approval of the Secretary of Labor, shall prescribe rules and regulations for the enforcement of the provisions of this Act; but all such rules and regulations, in so far as they relate to the administration of this Act by consular officers, shall be prescribed by the Secretary of State on the recommendation of the Secretary of Labor.

The following regulation, adopted pursuant to Section 24, by the joint action of the Secretary of

State and the Secretary of Labor, issued by the Department of State September 30, 1925, was part of "General Instruction Consular No. 926" (pp. 11, 14):

> *c. Determination of nonimmigrant status.*
>
> 35. Consuls are responsible in the first instance for determining whether or not an applicant is entitled to enter the United States as a nonimmigrant alien under section 3 of the act.
>
> * * * * *
>
> 37. * * *
>
> In passing on an application for passport visa and the evidence of status to be required, the following points should be carefully noted:
>
> * * * * *
>
> 48. Temporary visits, except under rule 8 of the Immigration Rules, July 1, 1925, for the purpose of performing labor for hire are not considered to be within the purview of section 3(2) of the act. However, personal servants accompanying their employers who are tourists or business men visiting the United States on a temporary visit and leaving with them might be granted passport visas under this section.

(Rule 8 is not material here.)

General Order No. 86, dated April 1, 1927, prescribed by the Commissioner General of Immigration, with the approval of the Secretary of Labor, is in Appendix A, at page 58.

Article III of the Jay Treaty of 1794 (8 Stat. 116, 117) is as follows:

It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other. But it is understood, that this article does not extend to the admission of vessels of the United States into the sea-ports, harbours, bays, or creeks of his Majesty's said territories; nor into such parts of the rivers in his Majesty's said territories as are between the mouth thereof, and the highest port of entry from the sea, except in small vessels trading bona fide between Montreal and Quebec, under such regulations as shall be established to prevent the possibility of any frauds in this respect. Nor to the admission of British vessels from the sea into the rivers of the United States, beyond the highest ports of entry for foreign vessels from the sea. The river Mississippi shall, however, according to the treaty of peace, be entirely open to both parties; and it is further agreed, that all the ports and places on its eastern side, to whichsoever of the parties belonging, may freely be resorted to and used by both parties, in as ample a manner

as any of the Atlantic ports or places of the United States, or any of the ports or places of his Majesty in Great Britain.

All goods and merchandize whose importation into his Majesty's said territories in America, shall not be entirely prohibited, may freely, for the purposes of commerce, be carried into the same in the manner aforesaid, by the citizens of the United States, and such goods and merchandize shall be subject to no higher or other duties, than would be payable by his Majesty's subjects on the importation of the same from Europe into the said territories. And in like manner, all goods and merchandize whose importation into the United States shall not be wholly prohibited, may freely, for the purposes of commerce, be carried into the same, in the manner aforesaid, by his Majesty's subjects, and such goods and merchandize shall be subject to no higher or other duties, than would be payable by the citizens of the United States on the importation of the same in American vessels into the Atlantic ports of the said states. And all goods not prohibited to be exported from the said territories respectively, may in like manner be carried out of the same by the two parties respectively, paying duty as aforesaid.

No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods

and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.

No higher or other tolls or rates of ferriage than what are or shall be payable by natives, shall be demanded on either side; and no duties shall be payable on any goods which shall merely be carried over any of the portages or carrying-places on either side, for the purpose of being immediately reembarked and carried to some other place or places. But as by this stipulation it is only meant to secure to each party a free passage across the portages on both sides; it is agreed, that this exemption from duty shall extend only to such goods as are carried in the usual and direct road across the portage, and are not attempted to be in any manner sold or exchanged during their passage across the same, and proper regulations may be established to prevent the possibility of any frauds in this respect.

As this article is intended to render in a great degree the local advantages of each party common to both, and thereby to promote a disposition favorable to friendship and good neighbourhood, it is agreed, that the respective governments will mutually promote this amicable intercourse, by causing speedy and impartial justice to be done, and necessary protection to be extended to all who may be concerned therein.

STATEMENT

The respondents, Mary Cook and Antonio Danelon, sought admission to the United States from Canada on December 1, 1927. Neither was born in Canada. Mary Cook is a British subject, born in Scotland, and came to Canada in May, 1924. She resides at Niagara Falls, Ontario, and is a spinner by occupation. (R. 10.) She had been employed for three weeks in the United States, crossing daily to her work. (R. 11.) At the time in question she was out of employment and sought admission to look for work (R. 11), hoping to find employment in a silk mill in Buffalo (R. 12).

Antonio Danelon was born in Italy. (R. 4.) He went to Canada, through the United States, in 1923 (R. 4), and lived with his father, Pietro Danelon, in Niagara Falls, Ontario. His petition for habeas corpus alleged that he became a Canadian citizen in 1924 by his father's naturalization (R. 2), but the record does not contain any proof of that fact (R. 7). It is not important whether he was or was not naturalized, as only native-born, and not naturalized, Canadians are exempt from the quota. He had been working at Niagara Falls, N. Y., since November, 1926 (R. 5), for the United States Light and Heat Company and for the Aluminum Company, crossing the border daily to work through the use of an identification card. His father had made application to the United States Consul in Canada in 1925 for quota visas for himself and the whole

family, but had not obtained them. (R. 6.) When held for inquiry in December, 1927, he was seeking admission to work by the day.

Both aliens were refused admission because not in possession of an unexpired consular immigration visa, and on the ground that they were immigrants because not visiting the United States for business.

A writ of habeas corpus was sued out in behalf of the two aliens. The District Court held that, assuming Article III of the Jay Treaty to be still in force, it only permitted passing from one country to another to carry on trade or commerce, and that passing to labor for daily wage was not within the contemplation of the treaty. The District Court also held that a visit to labor for hire was not a visit for business within the meaning of the exception in Section 3 of the Immigration Act of 1924. Holding that the aliens were immigrants within the meaning of Section 3 and not covered by the exception, it dismissed the writ and remanded the aliens to the custody of the immigration officials for exclusion. (R. 15–20.)

On appeal, the Circuit Court of Appeals held that these aliens were not immigrants because they did not intend to remain here permanently and that the coming of an alien to the United States daily to labor for hire was a visit for business within the meaning of Section 3 (2) of the Immigration Act. It also held that Article III of the Jay Treaty was still in effect and that its provision allowing British subjects to pass our boundaries by land or inland

navigation and to navigate our waters and to carry on trade and commerce allowed British subjects to come into the United States and labor for hire, and it reversed the order of the District Court. (R. 23–28.)

SPECIFICATION OF ERRORS TO BE URGED

I. The Circuit Court of Appeals erred in reversing the order of the District Court.

II. The court erred in holding that the respondents were nonimmigrants under Section 3 of the Immigration Act of 1924 and that in visiting the United States to labor for hire they were visiting the United States for business.

III. The court erred in holding that Article III of the Jay Treaty was still in effect and in holding that it allows British subjects freely to cross the border to labor for hire, or that it ever did more than permit free travel and trade and commerce.

SUMMARY OF ARGUMENT

I. On the answer to the question whether aliens coming here temporarily to labor for hire are here for business depends the decision as to whether such aliens are subject to the quota restrictions, and in that is found the practical importance of this case. The effect of the ruling below is not limited to those crossing the border daily for labor. Visits for business are considered temporary if as long as six months or a year. If coming for labor

is coming for business, a temporary stay of months to labor for hire is allowed regardless of the quota.

Natives of Canada and natives of Mexico are not subject to the quota, and are not seriously affected by this case, if physically, mentally, and morally qualified for admission. If the ruling below is right, aliens residing across our borders, not native-born Canadians or Mexicans, and aliens coming from abroad, are admissible regardless of the quota restrictions to engage in labor for hire for periods of months. The petitioners contend that the respondents were immigrants under Section 3 of the Immigration Act, because they were aliens departing from places "outside of the United States destined for the United States," and that they were not within the exception of aliens visiting the United States temporarily for business, because labor for hire is not business within the meaning of the statute and that to otherwise construe the Act would break down the protection for American labor intended by the quota restrictions.

The Jay Treaty enters into the case only to influence the construction of the statute. We contend that Article III of the Treaty was abrogated by the War of 1812, and in any event only permitted travel, trade, and commerce.

The construction of the treaty is first in order.

II. Article III of the Jay Treaty was abrogated by the War of 1812.

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Whether treaty stipulations are abrogated by subsequent war depends on their nature. It is settled by judicial decisions in the United States and by the dominant opinion of writers on international law and by prevailing international practice that treaty stipulations which fix boundaries and permanent territorial arrangements and settle property rights and other national rights, or which by their terms provide for the event of intervening war, are not extinguished by war; but stipulations not of that character are abrogated by war. Treaty stipulations dealing with commerce and navigation, granting privileges of that character, are recognized to be of the type abrogated by war. The stipulations in Article III of the Jay Treaty for free passage for travel, navigation, trade, and commerce are of the type abrogated by war. Great Britain has consistently maintained that such stipulations relating to commerce and navigation are abrogated, not merely suspended, by hostilities. Nothing in the diplomatic dealings between the United States and Great Britain justifies the contention that Article III has been recognized as subsisting since the War of 1812. Such free passage over our Canadian boundary as has been permitted since 1812 has not been because of the treaty, or of any recognition of it, but because our statutes and regulations on immigration and passports have permitted it.

In any event, Article III, construed in the light of the conditions on the border in 1794, was in-

tended to permit travel, navigation, trade, and commerce, and was not intended to guarantee the privilege of locating in either country to labor for hire unconnected with commerce. Article III of the treaty, as we construe it, is consistent with the exception in Section 3 of the Immigration Act as we construe it, as the latter, allowing temporary visits for business, refers to business in the narrower sense and not labor for hire. Whether treated as not in effect or still operative, Article III of the treaty forms no obstacle to the petitioners' construction of the Immigration Act.

III. Section 3 of the Immigration Act of 1924 includes, under the term "immigrant," any alien departing from any place outside of the United States destined for the United States, with only the exceptions stated. Petitioners are squarely within the general definition. Decisions under former statutes holding "immigrants" to be only those coming here for permanent residence are not in point. If by the term "immigrant" Congress intended to designate only aliens arriving for permanent residence, why did it except aliens in continuous transit through the United States, or seamen entering temporarily between voyages, or tourists temporarily here for pleasure? The exceptions prove the rule.

In the exception of those visiting temporarily for business, Congress did not use the word "business" as including labor for hire. Labor for hire

is not within the fair intendment of the word "business" as used in this statute, and persons coming to labor are not business men.

One of the principal objects of the quota Acts is to protect American labor against an influx of cheap foreign labor. That purpose would, to a considerable extent, be defeated if aliens in contiguous countries, or coming from abroad, are admissible temporarily to labor for hire, regardless of quota restrictions, and may reenter as often as they please.

The construction we contend for does not injure native-born Canadians or Mexicans, who are not subject to quota restrictions and who are allowed free passage if morally, mentally, and physically eligible. As early as October, 1924, the State and Labor Departments ruled that temporary visits to perform labor for hire are not visits for business. That the Canadian boundary crossing problem was not promptly dealt with on that basis was owing to efforts to work out a proper method and because no serious influx of labor was threatened for some time.

General Order No. 86 was promulgated because aliens began in large numbers to seek this method of penetrating the quota restrictions. The decision below holding that labor is business opens the door to an influx, both from the borders and from abroad, of foreign labor coming for temporary sojourn of a few months for "business," and which,

through quick methods of transportation, penetrate not merely the border zone, but throughout the United States. Petitioners are immigrants within the definition of the statute, and they are not here for "business" within the exception.

ARGUMENT

I

PRELIMINARY STATEMENT OF THE QUESTIONS INVOLVED AND THEIR RELATION TO EACH OTHER

The ultimate question is whether aliens visiting the United States to labor for hire are visitors for business, but a general survey of the problem arising under the immigration laws is necessary to a proper understanding of the case. Prior to the Immigration Act of 1924 the law treated as immigrants those arriving for indefinite or permanent stay and not those visiting the United States for temporary purposes. Some restrictions as to mental, physical, and other qualifications are applicable to both classes. Other restrictions, which apply to those coming for permanent stay, were not applied to temporary sojourners. The first quota Act of 1921 and the Immigration Act of 1924, with new quota provisions, increased the restrictions. The two aliens involved in this case live just across our northern boundary and visited the United States to labor for hire, crossing daily and returning each night to Canada. If they are not immigrants within the meaning of the 1924 Act, because visiting the United States temporarily for business, they

are not subject to the quota restrictions, but operation of the decision below is not limited to those crossing the boundary daily. A visit for business under the immigration laws and regulations may be temporary, although for more than one day.

Paragraph 1 of subdivision E, Rule 9, of Immigration Rules, promulgated February 1, 1924, reads as follows:

> Aliens visiting the United States as tourists or temporarily for business or pleasure for a period not to exceed six months shall not be subject to the provisions of Section 2 (a) of said Act of May, 1921, as amended, nor shall they be counted in reckoning any of the percentage limitations provided in said Act.

The rules promulgated July 1, 1925 (Paragraph 1, subdivision H, Rule 3) and those issued March 1, 1927, prescribe no fixed limit. The latter reads as follows:

> In cases where an alien claims to be visiting the United States temporarily as a tourist, or temporarily for business or pleasure, and the examining officer is satisfied beyond a doubt of the applicant's status, he may temporarily admit such alien, if otherwise admissible, for a reasonable fixed period on condition that such alien shall maintain such status of a nonimmigrant during his temporary stay in the United States and voluntarily depart therefrom at the expiration of the time fixed and allowed.

The regulations dealing with extensions of time provide:

> In no instance, however, shall the stay of an alien, admitted for a temporary visit, be extended for a period in excess of one year from the date of original entry. (Paragraph 2, Subdivision E, Rule 24, Immigration Rules of March 1, 1927.)

If aliens maintaining a domicile abroad may come here to labor as temporary visitors for business, they may stay here for months. Native-born Mexicans and native-born Canadians are exempted from the quota restrictions. (Sec. 4 (c), Immigration Act of 1924.) They may enter freely provided they are mentally, morally, and physically qualified. Once inspected they receive identification cards. The quota restrictions apply to naturalized Canadians and naturalized Mexicans, to aliens from other countries residing in Canada and Mexico, and to aliens coming from abroad (except natives of Cuba, Haiti, etc.). The position of the petitioners, if sustained, results in all aliens except native-born Canadians and native-born Mexicans, and natives of a few other places designated in Section 4 (c), being required to come within the quotas before admission to this country to labor for hire. Once admitted under the quota for that or any purpose, they may pass or repass the northern and southern boundary lines at will with identification cards prescribed by regulation. (Par. 1, sub. Q, Rule 3, Rules of March 1, 1927.)

These regulations are authorized by Sec. 13 (b), Immigration Act of 1924. (See also Executive Order No. 4476, July 12, 1926, Par. I, sub. (2), page 88, Immigration Rules of March 1, 1927.) If the respondents' contention is sustained, any alien physically, mentally, and morally qualified for admission at all, may enter the United States to labor for hire so long as he maintains his domicile abroad with the intention of returning there and provided his sojourn here is within the limits of a few months or a year. Leaving the United States and reentering results in a new visit.

An alien who leaves the United States and then returns makes a new entry.

Lapina v. *Williams*, 232 U. S. 78.
Lewis v. *Frick*, 233 U. S. 291.
Bendel v. *Nagle*, 17 F. (2d) 719.
Morini v. *United States*, 21 F. (2d) 1004.

The Jay treaty is brought into the case to make it appear that the Immigration Act, construed as we ask, would violate the treaty and repeal it, and the treaty is thus used to influence the construction of the statute so as to prevent the alleged conflict. Any construction of the statute brought about as a result of the treaty provisions will settle the meaning of the statute not only as to British subjects but as to all aliens, because what is a temporary visit for business for one alien is the same for all.

Before dealing with the construction of the Immigration Act, it is appropriate first to consider the treaty to determine whether it is a potent factor

in the interpretation of the statute. A statute may repeal a treaty, but if Article III of the Jay treaty be in force, and the statute, as we construe it, is in conflict with the treaty, that presents a formidable obstacle to the adoption of our construction. (*United States* v. *Lee Yen Tai*, 185 U. S. 213, 220; *Hijo* v. *United States*, 194 U. S. 315.)

II

ARTICLE III OF THE JAY TREATY WAS ABROGATED BY THE WAR OF 1812. IF TREATED AS STILL EFFECTIVE, IT GRANTS ONLY THE PRIVILEGE OF TRAVEL, NAVIGATION, TRADE, AND COMMERCE, AND IT WAS NEVER INTENDED TO DO MORE

The rules which determine whether a treaty stipulation is abrogated by war between the signatory powers are reasonably well defined. The effect of war depends upon the nature of the treaty stipulations. Some stipulations are of such a nature as to their object and import that war will put an end to them. Others are not affected by subsequent hostilities. Where a treaty stipulation provides for a permanent arrangement of territorial and other like national rights, such as boundary lines, or settles existing land titles, thus creating vested property rights, war does not abrogate the stipulation so as to divest the property rights or unsettle the permanent arrangements thus made. Treaties which by their terms deal with the case of war as well as peace, such as a stipulation that private property of enemy na-

tionals shall not be sequestered in time of war, manifestly are not abrogated by hostilities.

Treaties which expressly deal with intervening war and provide by their terms for the revival of the obligations after hostilities may have ceased, are not *ipso facto* extinguished by war. On the other hand, stipulations not of the kind above defined, and which merely grant temporary privileges not in the nature of fixed and permanent rights and arrangements are abrogated, not merely suspended, by war. The question here is whether the stipulations in Article III of the Jay treaty are of one type or of the other. It is not necessary to ascertain all of the different kinds of stipulations which are abrogated by hostilities. It seems to be generally recognized by the authorities, that an ordinary treaty of commerce and navigation, dealing with commercial intercourse between the treaty powers, is of the type abrogated, not merely suspended, by war, and the stipulations in Article III of the Jay treaty clearly are of that nature. The adjudged cases in the United States and in England are in accord with these principles.

In *The Society for the Propagation of the Gospel in Foreign Parts* v. *Town of New Haven*, 8 Wheat. 464, this Court dealt with the 6th Article of the Treaty of 1783, and with the 9th Article of the Jay treaty of 1794. The Definitive Treaty of Peace between the United States and His Britannic Majesty of September 3, 1783 (8 Stat. 80, 83), in Article VI, provided:

> That there shall be no future confiscations made * * * against any person or persons for, or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, * * *.

The 9th Article of the Jay Treaty of 1794 (8 Stat. 116, 122) provided:

> It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens.

The case of *The Society, etc.* v. *New Haven, supra*, dealt with these stipulations and was an action in ejectment involving the title to land which depended upon the operation of these two treaty stipulations. It was contended, on one side, that these treaty stipulations did not protect the title because the treaty had been abrogated by the War of 1812, the cause having arisen thereafter. The Court said (page 493):

> But there is a still more decisive answer to this objection, which is, that the termination of a treaty can not divest rights of prop-

> erty already vested under it. If real estate be purchased or secured under a treaty, it would be most mischievous to admit, that the extinguishment of the treaty, extinguished the right to such estate. In truth, it no more affects such rights, than the repeal of a municipal law affects rights acquired under it.

The Court then went on to discuss generally the question of abrogation of treaty stipulations by war and said (pp. 494–495):

> But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms, in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation, to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it is fixed our limits, and acknowledged our independence, would

> be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning. We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

This case did not, as asserted by the respondents in their brief in opposition, hold that the Jay Treaty was unaffected by the War of 1812. It held only that Article IX of the treaty, which operated to vest property rights, was not extinguished by subsequent hostilities in the sense of destroying the rights vested under it.

Jackson v. *Clarke*, 3 Wheat. 1; *Hughes* v. *Edwards*, 9 Wheat. 489; and *Shanks* v. *Dupont*, 3 Pet. 241, also deal with titles vested under Article IX of the Jay Treaty. There is no decision of this Court dealing with Article III.

In *Sutton* v. *Sutton*, 1 Russell & Mylne's Reports, 663, decided in the High Court of Chancery in 1830, the court was considering a bill for specific performance of a contract for the sale of real estate, the title to which was affected by the operation of

Article IX of the treaty of 1794, and the court held that Article IX was permanent in its effect and not of the type abrogated by hostilities. It dealt with no other stipulation of the treaty.

In *United States ex rel. Diabo* v. *McCandless*, 18 F. (2d) 282, the District Court for the Eastern District of Pennsylvania considered, in the case of an Indian, whether the stipulation in Article III of the Jay treaty, giving to the Indians dwelling on either side of the boundary line the privilege to pass and repass, was abrogated by the War of 1812. It held that the right of the Indians to pass from one part of the Indian country to another was not created by the treaty, and the fixing of the boundary line did not affect the right, and that the right was wholly unaffected by the treaty, except that the contracting parties agreed with each other that each would recognize it, and it held that there was no reason why the War of 1812 between the United States and Great Britain should have permanently abrogated the Indian right of passage. The case went to the Circuit Court of Appeals for the Third Circuit. (*McCandless, Comm'r of Immigration*, v. *Diabo*, 25 F. (2d) 71.) That court held, first, that the Indian right was not created by the Jay treaty, but existed independently of it, since the Indian country extended on both sides of the line; second, that there was no occasion to consider the effect of the War of 1812 on the treaty, in so far as it affected the signatory parties who went to war. It also referred to Article IX of the

Treaty of Ghent, which provided (8 Stat. 218, 222):

> The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities.

His Britannic Majesty made the same undertaking with respect to restoration of the Indians' rights and privileges.

The Circuit Court of Appeals thereupon held that even if the stipulation in Article III of the Jay Treaty, relating to the Indians, was abrogated by the War of 1812, the privilege granted by the Jay Treaty was restored by the Treaty of Ghent. It held, in substance, that in so far as the Indians were affected there was no reason why the War of 1812 should be considered as having extinguished any right of passage belonging to Indian tribes along the border. That case was decided March 9, 1928. While the question of applying for certiorari was under consideration, there was approved April 2, 1928, the following statute (c. 308, 45 Stat. 401):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the

Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States: *Provided*, That this right shall not extend to persons whose membership in Indian tribes or families is created by adoption.

That put an end to the litigation, but in passing it may be noted that the necessary inference from the statute is that the right of passage is limited to the Indians and that a white Canadian who joins a tribe by adoption is not entitled to the right.

It is obvious that none of the decisions above cited and none cited by the court below or by the respondents in opposition hold that the stipulation in Article III of the Jay treaty, in so far as it affected the contracting powers, remained in force after the War of 1812.

Writers on international law support the view that treaties often contain various unrelated provisions and that one provision in a treaty may be terminated by war while other provisions in the same treaty remain intact, and that whether stipulations are annulled by war depends upon their intrinsic character.

John Bassett Moore, Columbia Law Review, Vol. 1 [1901], pp. 209, 217, affirms:

> the principle, which is now received as fundamental, that the question whether the stipulations of a treaty are annulled by war depends upon their intrinsic character.

Wheaton, Elements of International Law (Lawrence's 6th Ed., p. 343), says:

> Most international compacts, and especially treaties of peace, are of a mixed character, and contain articles of both kinds, which renders it frequently difficult to distinguish between those stipulations which are perpetual in their nature, and such as are extinguished by war between the contracting parties, or by such changes of circumstances as affect the [well] being of either party, and thus render the compact inapplicable to the new condition of things.

See also Phillimore's International Law, Ed. 1885, Vol. III, DXXXIV and DXXXV, and Halleck's International Law, Chap. XXXVI, p. 898.

In *Techt* v. *Hughes*, 229 N. Y. 222, 243, Judge Cardozo said:

> The mere fact that other portions of the treaty are suspended or even abrogated is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act.

That case dealt with the question whether the stipulation in the Convention between the United States and Austria of May 8, 1848, concerning the right of citizens or subjects of either country to inherit real property was abrogated by the war between the United States and Austria-Hungary. The court said further (p. 245):

> Commerce is friendly i n t e r c o u r s e. Friendly intercourse between nations is im-

possible in war. Therefore, treaties regulating such intercourse are not operative in war. But stipulations do not touch commerce because they happen to be embodied in a treaty which is styled one to regulate or encourage commerce. We must be on our guard against being misled by labels. Bluntschli's warning, already quoted, reminds us that the nature and not the name of covenants determines whether they shall be disregarded or observed. There is a line of division, fundamental in importance, which separates stipulations touching commerce *between* nations from those touching the tenure of land *within* the territories of nations.

Crandall, in his book on Treaties, Their Making and Enforcement (page 451), says:

Whether such treaties are merely suspended in their operation during the period of the war and revive on the restoration of peace, or are definitively terminated if not expressly renewed, is a question on which writers on international law are not agreed. The practice of nations may, by implication at least, be considered as in derogation of the doctrine of the revival of such treaties *proprio vigore*. Moreover, it is the undoubted right of a belligerent to make the renewal of former treaty relations a condition of peace—ultimately to be determined by the victor—and the failure to do so might, in view of the usual practice of making express provision as to renewal, be considered as a waiver or an abandonment of that right.

In Kent's Commentaries on International Law, Abdy's Ed., 1866, it is said (pp. 420–421):

> As a general rule, the obligations of treaties are dissipated by hostility. But if a treaty contains any stipulations which contemplate a state of future war, and make provision for such an exigency, they preserve their force and obligation when the rupture takes place. All those duties of which the exercise is not necessarily suspended by the war, subsist in their full force. The obligation of keeping faith is so far from ceasing in time of war, that its efficacy becomes increased, from the increased necessity of it. What would become of prisoners of war, and the terms of capitulation of garrisons and towns, if the word of an enemy was not to be relied on? The faith of promises and treaties which have reference to a state of war, is to be held as sacred in war as in peace, and among enemies as among friends. All the writers on public law admit this position, and they have never failed to recommend the duty and the observance of good faith, by the most powerful motives, and the most pathetic and eloquent appeals which could be addressed to the reason and to the moral sense of nations. The tenth article of the treaty between the United States and Great Britain, in 1794, may be mentioned as an instance of a stipulation made for war. It provided, that debts due from individuals of the one nation to those of the other, and the shares or moneys which they might have

in the public funds, or in public or private banks, should never, in any event of war, be sequestered or confiscated. There can be no doubt that the obligation of that article was not impaired by the War of 1812, but remained throughout that war, and continued binding upon the two nations, until they should mutually agree to rescind the article; for it is a principle of universal jurisprudence, that a compact can not be rescinded by one party only, if the other party does not consent to rescind it, and does no act to destroy it. In the case of *The Society for Propagating the Gospel* v. *New Haven*, the Supreme Court of the United States would not admit the doctrine that treaties became extinguished *ipso facto* by war, unless revived by an express or implied renewal on the return of peace. Such a doctrine is not universally true. Where treaties contemplate a permanent arrangement of national rights, or where, by their terms, they are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. They revive at peace, unless waived, or new and repugnant stipulations be made.

In Woolsey's International Law, 6th Ed., pp. 263–264, it is said:

War suspends all intercourse, political, social, commercial, except so far as intercourse is required by the purposes of war itself. But does it end all treaties? In

answer we say that certain stipulations are in their nature or terms lasting. Such are: (1) Those which contemplate a state of war, and therefore could have no effect if rendered null by war. (2) Those which are declared to be perpetual, like the liberty, under our treaty of 1818 with Great Britain, "forever to cure and dry fish" in certain places (§59). War can only suspend such a provision. (3) Those which imply some state or relation in itself permanent. Of this kind is a past recognition of a state within certain boundaries. For an organized community upon a specific territory is an admitted fact, to which only conquest, the destruction of a condition otherwise permanent, can put an end. (4) The same perpetual nature belongs to a compact to regard certain rules or interpretations as part of the law of nations, since the state of peace or war between two parties cannot affect general principles of justice.

It has been held by some, especially earlier, writers, in some diplomatic documents, and by at least one nation, that apart from cases like those above mentioned treaties do not survive a new war. Dr. Twiss says that, in practice, Great Britain admits of no exception to the rule that all treaties, as such, are put an end to by a subsequent war between the contracting parties. ("Law of Nations in Peace," §234.) That the treaties of Westphalia and Utrecht were often renewed in treaties, following wars be-

> tween the parties to them, indicates that at least their survival was not certain. And if a war were closed without an express treaty, the rule of *uti possidetis* would decide even territorial sovereignty. We come, then, to this conclusion: that the effect of war on those provisions of treaties, the breach of which did not provoke the war, is at least doubtful, and that new treaties after war ought to contain explicit renewal of such arrangements. This is to a great extent the practice.

See also Moore's International Digest, Vol. 5, pp. 373 and 397.

Halleck, in his International Law, 4th Ed., Vol. 1, p. 314, expresses the following view:

> Treaties of alliance, of succour and subsidy, of commerce and navigation—in fine, all stipulations having reference exclusively to pacific relations, cannot be construed to subsist after such relations have become hostile.

He then draws a distinction between treaty provisions concerning commerce and navigation and stipulations concerning the fixing of boundaries, tenure of property, public debts, etc., which being essentially permanent in character are not terminated by wars.

Hyde in his work entitled "International Law, chiefly as interpreted and applied by the United States," says:

> Stipulations pertaining to commerce and navigation are not of permanent character,

> and do not purport to manifest a design on the part of the contracting States to establish rights which should survive a war between them. Nor is it believed that provisions concerning social intercourse, or pertaining to the enjoyment of economic and political privileges, such as are embraced in naturalization conventions, stand on a better footing. (Vol. II, page 95.)

In a footnote on the same page Mr. Hyde cites a number of instances in which treaty provisions concerning commerce and navigation were treated by the parties after the termination of wars between them as having been abrogated by such wars.

Phillimore's Commentaries upon International Law, Ed. of 1885, Vol. III, pp. 800-801, approves the view that treaties of commerce and navigation are annulled by war.

Hall's Treatise on International Law, 5th Ed., 1904, pp. 389–390, speaking of commercial treaties, postal conventions, etc., says:

> Treaties of the fifth class are necessarily at least suspended by war, many of them are necessarily annulled, and there is nothing in any of them to make them revive as a matter of course on the advent of peace,—frequently in fact a change in the relations of the parties to them effected by the treaty of peace is inconsistent with a renewal of the identical stipulations. It would appear therefore to be simplest to take them to be

> all annulled, and to adopt the easy course, when it is wished to put them in force again without alteration, of expressly stipulating for their renewal by an article in the treaty of peace.

Westlake, International Law, Part II, pp. 32–35, mentions three classes of treaties which are not affected by war, namely, (1) those providing "what is to be done in a state of war," (2) "transitory or dispositive treaties, including all those which are intended to establish a permanent condition of things," such as "treaties of cession, boundary, recognition of independence or of a dynasty" and those "intended for use in daily life and having no conceivable connection with the causes of war or peace"; and (3) "treaties establishing arrangements to which third powers are parties, such as guarantees and postal and other unions." With regard to all other treaties, including commercial treaties, he says:

> Outside the exceptions which have been discussed, treaties between belligerents do not survive the outbreak of the war. At the peace there is no presumption that the parties will take the same view as before the war of their interests, political, commercial or other. It is for them to define on what terms they intend to close their interlude of savage life and to reenter the domain of law. (Pp. 34–35.)

It would be an arduous task and avail little to attempt to set forth the views of writers other than

American and British upon this subject. However, in view of the high standing of the author, we call attention to the opinion expressed by Fauchille, Traité de Droit International Public, 1921, Vol. II, p. 55. After mentioning various classes of treaties not affected by war, he says:

> On the contrary a state of war puts an end to treaties concluded with a view to peaceful relations between the signatories and the object or end of which is to strengthen or maintain such peaceful relations, for example, treaties of alliance, subsidies, guarantees, commerce, navigation, customs union, etc. Those treaties from their very nature are subject to an implicit resolutory condition, namely a break in the state of peace. They cannot survive the outbreak of hostilities between the signatory States. War, to them, is a cause of final extinction and not of mere suspension. When peace is concluded, they do not spontaneously come out of a comatose state; they do not revive unless expressly renewed in the peace treaty.

The passage just quoted is followed by a statement concerning the actual practice of states with regard to treaties after the termination of war between the parties, and the usual practice seems to have been to regard commercial treaties as having been annulled by the war.

Some writers are inclined to take the contrary view. Taylor's Treatise on International Public Law, paragraph 462; Hershey's Essentials of In-

ternational Public Law and Organization, Revised Edition, 1927, page 564; Lawrence, The Principles of International Law, Ed. 1895, pp. 310–311; Oppenheim, International Law, Ed. 1906, Vol. II, pp. 107–108.

Whatever difference of opinion there may be between authors on this subject, international practice is to treat commercial treaties and stipulations such as those contained in Article III of the Jay Treaty as abrogated, not merely suspended, by war.

So far as we can find, the British Government has consistently adhered to that view. The treaty of peace of 1783 between the United States and Great Britain (8 Stat. 80, 82) stipulated in Article III:

> It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the gulph of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island); and also on the coasts, bays and creeks of all other of his Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours and creeks of Nova

> Scotia, Magdalen islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground.

In 1815 the question arose whether this stipulation had been abrogated by the War of 1812. The British Government took the position that the stipulation had been terminated. Mr. Adams, the American Minister at London, took the position that the stipulation was of a type suspended but not abrogated by war. Lord Bathurst said (American State Papers, Foreign Relations, Vol. IV, p. 355):

> It is by no means unusual for treaties containing recognitions and acknowledgments of title, in the nature of perpetual obligation, to contain, likewise, grants of privileges liable to revocation. The treaty of 1783, like many others, contained provisions of different characters—some in their own nature irrevocable, and others of a temporary nature. If it be thence inferred that, because some advantages specified in that treaty would not be put an end to by the war, therefore, all the other advantages were intended to be equally permanent, it must first be shown that the advantages themselves are of the same, or at least of a similar character; for the character of one advantage

> recognized or conceded by treaty can have no connexion with the character of another, though conceded by the same instrument, unless it arises out of a strict and necessary connexion between the advantages themselves. But what necessary connexion can there be between a right to independence and a liberty to fish within British jurisdiction, or to use British territory? Liberties within British limits are as capable of being exercised by a dependent, as by an independent state, and can not, therefore, be the necessary consequence of independence.

In his reply of January 22, 1816, to Lord Bathurst, Mr. Adams said (p. 357):

> The undersigned believes that there are many exceptions to the rule by which the treaties between nations are mutually considered as terminated by the intervention of a war; that these exceptions extend to all engagements contracted with the understanding that they are to operate equally in war and peace, or exclusively during war; to all engagements by which the parties superadd the sanction of a formal compact to principles dictated by the eternal laws of morality and humanity; and, finally, to all engagements which, according to the expressions of Lord Bathurst's note, are *in the nature of perpetual obligation*. To the first and second of these classes may be referred the tenth article of the treaty of 1794, and all treaties or articles of treaties stipulating the abolition of the slave trade. The treaty of peace of 1783 belongs to the third.

The British Government never yielded, and in October, 1818, a new treaty was signed (8 Stat. 248) which yielded to the citizens of the United States fishing privileges along the southern coast of Newfoundland and the coast of Labrador less than those enjoyed under the treaty of 1783.

So far as we can find, the British Government has not since the War of 1812 ever asserted that Article III of the Jay Treaty was not abrogated. At this time the Canadian immigration officials will not permit American workmen to cross into Canada to labor or to seek employment.

Neither can we find any assertion by the United States that Article III has remained in effect. In 1885, Secretary Bayard declared that the Treaty of 1794 had been abrogated, except as to property vested under it. (Moore's Digest, Vol. 5, p. 374.) Appendix D to General Instruction Consular No. 926, issued by the State Department September 30, 1925, regarding the administration of the Immigration Act of 1924, purports to contain a list of all treaties relating to commerce and navigation, to which Section 3(6) of the Immigration Act of 1924 is applicable, but neither the Jay Treaty nor Article III thereof is mentioned in the list.

It appears that, in response to a Resolution of the Senate dated February 3, 1919, directing the Secretary of State to furnish the Senate with information regarding

> the countries with which the United States has treaties which prevent us from giving

> preference to Americans or American ships in the carrying of imports and exports, and what is necessary to be done to abrogate such treaties, and what, if any, steps our Government has taken to secure the abrogation of the same,

the Acting Secretary of State, on March 27, 1919, transmitted a memorandum to the Senate in which Article III of the Treaty of 1794 was quoted as one of the treaty provisions which might be affected by legislation giving preferential treatment to Americans or American ships, and the statement was made:

> The treaty from which the above-quoted Article is taken contains no provision for abrogation; hence agreement by the parties thereto would seem to be necessary effectively to accomplish its abrogation as an international agreement.
>
> No action has been taken by either government looking to abrogation.

The suggestion thus made seems to be contrary to the weight of opinion. Certainly, consistently with its practice, the British Government would be the last to assert that Article III remained in effect after the War of 1812.

As the last important indication of international practice and understanding, it may be observed that in the treaties of peace terminating the World War (Treaty of Versailles, June 29, 1919, Article 289; Treaty of St. Germain, September 10, 1919, Article 241; Treaty of Neuilly, November 27,

1919, Article 168) provisions were made in which bilateral treaties between the parties existing at the time of the outbreak of war might be "revived." It was added that all other treaties should "remain abrogated."

In support of the theory that Article III of the Jay Treaty was intended by the parties to survive subsequent hostilities, mention has been made of the provision in Article XVIII of the treaty that it was—

> agreed, that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years * * *.

To meet this it is sufficient to quote the argument of the learned counsel who long ago argued the case of *Sutton* v. *Sutton*, 1 Russell & Mylne's Reports, 663, and who said (pp. 670–671):

> It was said before the Master, that the first ten articles of the treaty were to be "permanent," which was construed as synonymous with "perpetual"; but that is a construction which the twenty-eighth article does not admit of. The very first article is, "that there should be a firm and universal peace between *Great Britain* and the United States"; that is the first of the articles supposed to be ever-enduring. Yet, what became of it in 1813? There are many of the stipulations of the first ten articles, which could not possibly be observed in a state of war. The word "per-

> manent" is used, not as synonymous with "perpetual or everlasting," but in opposition to a period of duration expressly limited. The greater number of the articles of the treaty were to cease at the expiration of twelve years; the first ten were not to expire then, by the mere lapse of time; they were to continue so long as a treaty of peace was in force; but when war took the place of peace, and the treaty had no longer any existence, the ninth article could not continue in operation.

Such of the first ten articles as remained in effect after the War of 1812 survived not by reason of the stipulation for permanency, but because intrinsically they or the rights vested under them were not of the type abrogated by hostilities.

We find no support for the respondents' contention that the practice of allowing persons residing in Canada to cross and recross the boundary line freely has been because of the belief that Article III of the Jay Treaty required it. This privilege has been allowed because it was in accordance with our legislative policy, and because the statutes and regulations on the subject of immigration and passports have not prohibited it.

There are many respects in which the stipulations of Article III have admittedly been treated as abrogated. For a long time it has not been free to all British subjects to freely pass into all territories of the United States and to freely carry on trade and commerce. Some have been excluded

because of lack of personal qualifications. The stipulation that the

> river Mississippi shall, however, according to the treaty of peace, be entirely open to both parties

could not now be claimed to be in operation. The provision that—

> No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively

has long since been abrogated by statute. Tariff Acts have long contained varying provisions imposing duties on furs, dressed and undressed.

Nevertheless, if Article III of the Jay Treaty be still in effect, it places no obstacle in the way of interpreting the word "business" in Section 3 of the Immigration Act of 1924 to exclude labor for hire. The fair import of Article III of the Treaty was to grant the privilege of traveling through the respective territories, navigating their waters, and carrying on trade and commerce. The conditions prevailing along the boundary at the time of the making of that treaty were such that no other purpose could have been sought. The explanatory article adopted May 4, 1796 (8 Stat. 130) confirms this. It stated:

> That no stipulations in any treaty subsequently concluded by either of the contracting parties with any other state or nation, or with any Indian tribe, can be understood

> to derogate in any manner from the rights of free intercourse and commerce, secured by the aforesaid third article of the treaty of amity, commerce and navigation, to the subjects of his Majesty and to the citizens of the United States, and to the Indians dwelling on either side of the boundary line aforesaid; but that all the said persons shall remain at full liberty freely to pass and repass by land or inland navigation, into the respective territories and countries of the contracting parties, on either side of the said boundary line, and freely to carry on trade and commerce with each other, according to the stipulations of the said third article of the treaty of amity, commerce and navigation.

Nothing in Article III justifies the contention that the contracting parties intended to stipulate that subjects of the British Government could settle in the United States and engage in labor for hire or that anything more was intended than to provide for free commercial intercourse and passage through the waterways and over the portages for purposes of travel, trade, and commerce.

In a letter dated November 19, 1794, to Secretary of State Randolph, Mr. Jay said:

> The third article will, I presume, appear to you in a favorable light; a number of reasons which, in my judgment, are solid, support it. I think they will, on consideration, become obvious. It was proposed and urged that the commercial intercourse

> opened by this article ought to be exempted from all duties whatever on either side. The inconveniences which we should experience from such a measure were stated and examined; it was finally agreed to subject it to native duties. In this compromise, which I consider as being exactly right, that difficulty terminated; but for this compromise the whole article would have failed, and every expectation of an amicable settlement been frustrated. A continuance of trade with the Indians was a decided ultimatum; much time and paper, and many conferences were employed in producing this article; that part of it which respects the ports and places on the eastern side of the Mississippi, if considered in connexion with the —— article in the treaty of peace, and with the article in this treaty which directs a survey of that river to be made, will, I think, appear unexceptionable. (American State Papers, Foreign Relations, Vol. I, p. 503.)

To construe the word "business" in Section 3 of the Immigration Act to exclude labor for hire does not run counter to the fair construction of Article III of the Jay Treaty, except that under the Immigration Act business visits must be temporary, while visits to the United States for trade and commerce under the Jay Treaty were unlimited in duration. This in itself shows that the Immigration Act ignored the Jay Treaty. We believe, therefore, that the construction of the Immigration Act contended for by the petitioners should

not be rejected because it is thought to be in conflict with any stipulation in the Jay Treaty.

III

AN ALIEN WHO VISITS THE UNITED STATES TO LABOR FOR HIRE IS NOT A VISITOR FOR BUSINESS

The Circuit Court of Appeals and the respondents devote time to the contention that the respondents are not fairly within the definition of "immigrant" in the first part of Section 3. Their contention is that the word "immigrant" is ordinarily understood to mean one who comes here for permanent residence, and not for temporary purposes, and that one who retains a domicile or residence abroad and comes to the United States temporarily to work is not an immigrant.

The authorities cited to support this contention antedate the passage of the Immigration Act of 1924. No doubt in times past the word "immigrant," as used in our law, has ordinarily been used to describe those coming here for permanent or indefinite residence. The Immigration Act of 1924, however, makes its own definition of the word "immigrant." It is all inclusive and free from ambiguity. Section 3 says:

> When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States.

This sentence is not qualified by the words "for permanent residence." The exceptions in Section

3 prove the rule. If the definition of the term "immigrant" in the first clause was not broad enough to include aliens coming here for temporary stays, why was it necessary to except aliens in continuous transit through the United States, officials of other governments, seamen stopping over at our ports between voyages, or aliens visiting the United States temporarily as tourists, or temporarily for business or pleasure? To argue that the respondents are not within the initial definition of the word "immigrant," even if they are not protected by the exception, leads to the conclusion that there is a class of aliens not dealt with by the statute. It is too clear for argument that, to escape inclusion in the definition of "immigrant," the respondents must come within one of the exceptions. They can not escape on the theory that the term "immigrant" was not used to include persons making temporary visits. In Section 7 (b) of the Act of 1924, providing for the contents of applications for immigration visas, it is provided that every immigrant applying for an immigration visa shall state in his application—

> the purpose for which he is going to the United States; the length of time he intends to remain in the United States; whether or not he intends to abide in the United States permanently.

This is hardly consistent with the notion that no one is an immigrant under the Act unless he intends to remain permanently.

The real question in this case is whether Congress intended the word "business" to include labor for hire. It does not help to a conclusion to quote lexicographers to the effect that the word "business" may sometimes be used to include labor for hire. The question here is in what sense it was used in this Act. That is to be determined, among other things, by the objects and purposes of the statute. In common parlance the word "business" does not include labor for hire, nor do we think of a laborer as being a business man, nor would it seem reasonable for a common laborer from southeastern Europe coming here to work in the mines, or on a construction job, to call himself a business man, or say that he is coming to the United States on a business visit.

The origin of the provisions of Section 3 of the Immigration Act may be found in Section 3 of the Immigration Act of February 5, 1917. (c. 29, 39 Stat. 874, 875.) That Act, after providing for the exclusion of persons mentally, morally, or physically defective, or whose beliefs on governmental matters disqualified them for admission, provided for the complete exclusion of natives of what is known as the barred zone, and then, with respect to persons coming from the barred zone, stated that the provisions should not apply to

> Government officers, ministers or religious teachers, missionaries, lawyers, physicians, chemists, civil engineers, teachers, students,

> authors, artists, merchants, and travelers for curiosity or pleasure.

Here we have governmental officers, and merchants and travelers for curiosity or pleasure dealt with. There is nothing in that provision to justify the exception of those coming to labor for hire.

The quota Act of May 19, 1921 (c. 8, 42 Stat. 5), in Section 2(a), provided—

> That the number of aliens of any nationality who may be admitted under the immigration laws of the United States in any fiscal year shall be limited to three per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910. This provision shall not apply to the following, and they shall not be counted in reckoning any of the percentage limits provided in this Act: (1) Government officials, their families, attendants, servants, and employees; (2) aliens in continuous transit through the United States; (3) aliens lawfully admitted to the United States who later go in transit from one part of the United States to another through foreign contiguous territory; (4) aliens visiting the United States as tourists or temporarily for business or pleasure.

Here, instead of using the words "merchants, and travelers for curiosity or pleasure," the phrase is

aliens visiting us "as tourists or temporarily for business or pleasure." No doubt the word "business" was substituted for merchants, since there are various kinds of commercial intercourse and business not strictly merchandising, but there is nothing to suggest that the phrase was broadened for the purpose of including laborers or workmen. The phrase used in the Immigration Act of 1921 was again used in the Act of 1924. Prior to the quota Acts there was no reason to distinguish between working people and business men. With certain exceptions, because of ineligibility for admission to citizenship or treaty obligations, all persons physically, mentally, and morally qualified for admission were allowed to enter, whether for temporary or permanent stays. The quota Act changed this. One purpose was to restrict the number of immigrants because of the difficulty of assimilation.

An important purpose of the quota Act was, however, to protect American labor against an influx of cheap foreign labor and to prevent an aggravation of the conditions in respect of nonemployment. This is made clear by the reports of the Committees of the House and Senate relating to the Quota Act of May 19, 1921, and to the quota provisions in the Immigration Act of 1924. In speaking of the exemptions in Section 2 (a) of the 1921 Act of persons visiting the United States temporarily for business, the House Report says (p. 2): "Liberal

exemptions are made, including travelers for business or pleasure." This does not seem to contemplate persons coming here to labor. The report gives as a reason for restriction (p. 3): "Large unemployment in the United States, making it impracticable for the United States to accept a heavy immigration."

Attention is called in the Report to the fact that arriving immigrants go to the coastal cities and congested industrial districts. (House Report No. 4, p. 6, 67th Cong., 1st Session.)

The Senate Report on the Act of 1921 (Senate Report No. 17, 67th Cong., 1st Session) says (p 4):

> This new immigration coming almost wholly from eastern and southern Europe differed in character from the old immigration in that substantially 70 per cent of it, as a whole, consisted of males and substantially 86 per cent of the males were living single lives, being unmarried or having left their wives in Europe. They came to the United States not so much for the purpose of remaining here and making homes as to seek profitable employment at the seats of our great basic industries.

In showing that this type of immigrant is migratory and his sojourn temporary, it was said (p. 5):

> In connection with alien departures, it should be noted that the number of departures of the new group of aliens comprising

> southern and eastern Europe far exceeds that of the old group comprising northern and western Europe. For example, in the year ending June 30, 1920, there were 226,560 departures of the new group as compared with 41,532 of the old group; in other words, there were 122 departures of the new group to every 100 admitted, while of the old group there were only 25 departures to every 100 admitted. In the month of July 1920, of the new group there were 22,534 departures and there were 34,228 admitted, while of the old group there were only 3,451 departures and 19,869 were admitted. These figures forcibly illustrate the temporary character of the emigration from southern and eastern Europe.

Other parts of the report disclose the purpose to protect American labor. Like considerations are advanced with respect to the revised quota provisions in the 1924 Act. (House Report No. 350, 68th Cong., 1st Session.)

The first Quota Act of 1921 excepted from its operation aliens who resided continuously for one year in Canada and Mexico. Because of the rush of aliens to these countries to qualify by short residence, the exception was modified in 1922 to require five years residence in the contiguous countries to avoid the quota restrictions, and finally, in the Act of 1924, that method of being relieved from the quota was stricken out entirely.

While this case deals only with daily crossing of the border, it is obvious that the effect of the ruling of the court below is more far-reaching. The regulations have always provided that temporary presence for business purposes may extend for six months or even a year. If labor is business, temporary presence to labor for hire may be that long. Large numbers of alien laborers are migratory. It is common knowledge that with modern, quick, and cheap transportation they come from abroad, work here for a time, and return. The construction of the statute adopted by the Circuit Court of Appeals opens the doors wide to the admission of migratory alien labor, domiciled across the boundary line or even abroad, and admitted to engage in labor for months at a time over any part of the United States. In *U. S. ex rel Graber* v. *Karnuth*, not yet reported, but printed in Appendix B hereto, at page 62, the court below seems to proceed on the theory that the words used in the immigration laws mean one thing in the case of subjects of Great Britain, because of the Jay Treaty, and another thing when applied to other aliens.

Our petition for certiorari and supporting brief stated, in substance, that not until 1927, when General Order No. 86 was issued, did the Department of Labor construe the Immigration Act of 1924 as here contended for. In this we were mistaken. The original petition for certiorari and supporting

brief were inadequate in several respects. The records of the Department of Labor and the Department of State show that as early as October 13, 1924, the Department of Labor with the Canadian boundary in mind, held that persons coming to the United States to labor for hire or to search for employment were not coming for business or pleasure within the meaning of the Act. (See Appendix C, p. 68.)

The regulation adopted pursuant to Section 24 of the Immigration Act of 1924 by joint action of the Secretary of State and the Secretary of Labor, issued September 30, 1925 (set forth hereinabove, page 6), is that—

> temporary visits * * * for the purpose of performing labor for hire are not considered to be within the purview of section (2) of the act.

That General Order No. 86, relating particularly to the Canadian boundary, was not promulgated until April 1, 1927, was not because of any shifting of position by the Department of Labor, but because careful consideration was being given to the proper method of dealing with the problem, and as natives of Canada are not within the quota at all, the situation was not urgent. It was not until some ingenious individual, seeking a hole in the quota restrictions, stimulated the thought that aliens residing across the boundary could enter to labor or to search for employment in the United

States on the theory that they were coming here for business, that the matter became urgent. Now, as the result of the decision below, aliens land at our Atlantic ports, claiming to enter temporarily for business, whose purpose is to search for employment or to engage in labor for hire, and when excluded by the immigration authorities are being discharged on writs of habeas corpus on the authority of the decision below.

It may also be suggested, even if the word "business" be construed to include labor, that one residing in Canada whose permanent occupation is to engage in labor in the United States, who intends to continue in it indefinitely, is not made a temporary visitor within the meaning of the statute by the fact that he crosses the boundary daily. That construction of the Act would not cover the case of seasonal labor and we take the broader view that laboring for hire, or seeking employment, is not business.

Although the word "business" has often been construed to include labor, the purpose of the Immigration Act, the connection in which the word is used in the statute and the context make it a reasonable view that Congress did not intend that aliens coming here to labor for hire or to search for such employment should be treated as visiting the United States temporarily for business or pleasure.

It is respectfully submitted that the judgment below should be reversed.

WILLIAM D. MITCHELL,
Solicitor General.
FRANK M. PARRISH,
Attorney.

GREEN H. HACKWORTH,
Solicitor, Department of State.
RICHARD W. FLOURNOY, JR.,
Assistant to Solicitor,
Department of State.
THEODORE G. RISLEY,
Solicitor, Department of Labor.
B. W. BUTLER,
ALBERT E. REITZEL,
Assistants to Solicitor,
Department of Labor.

FEBRUARY, 1929.

APPENDIX A

BUREAU OF IMMIGRATION,
Washington, April 1, 1927.

No. 55479/537
55266/General.

GENERAL ORDER NO. 86

SUBJECT: LAND BORDER CROSSING PROCEDURE

1. Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to seek employment in this country will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the "immigrant" class.

2. However, the following aliens of the said "immigrant" class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessable on aliens entering permanently at the time of original admission and, provided further, that they are not coming to seek employment.

A. Aliens whose original admission occured prior to June 3, 1921.

B. Natives of nonquota countries whose original admission occurred prior to July 1, 1924.

C. Natives of quota countries whose original admission occurred subsequent to June 2, 1921, and prior to May 11, 1922, who at the time of such admission had resided in the Dominion of Canada, Newfoundland, the Republic of Cuba, the Republic of Mexico, or countries of Central or South America, or adjacent islands, for a period of one year.

D. Natives of quota countries whose original admission occurred subsequent to May 10, 1922, and prior to July 1, 1924, who at the time of such admission had resided in the Dominion of Canada, Newfoundland, the Republic of Cuba, the Republic of Mexico, or countries of Central or South America, or adjacent islands, for a period of five years.

3. Aliens of all nationalities of the "immigrant" class whose original admission occurred subsequent to June 30, 1924, will be required to meet all provisions of the Immigration Laws applying to aliens of the "immigrant" class. Aliens of this class already enjoying the border crossing privilege, however, will be granted a reasonable time, not to exceed six months from June 1, 1927, within which to obtain immigration visas and otherwise comply with the laws.

4. Aliens who have already complied with the requirements of the Immigration Laws and this General Order may be permitted to continue to enjoy the border crossing privilege.

5. Aliens who have complied with the requirements of this General Order governing permanent admission will be considered as having entered for permanent residence.

6. The use and issuance of identification cards to all classes of aliens entitled to same will continue as heretofore.

7. Identification cards held by or issued to aliens of the "immigrant" class shall be rubber-stamped as follows:

IMMIGRANT

Dated this —— day of ————, 192—, at ————.

----------,
Immigrant Inspector.

8. Identification cards held by or issued to aliens of the "nonimmigrant" class shall be rubber-stamped as follows:

NONIMMIGRANT

Dated this —— day of ————, 192—, at ————.

----------,
Immigrant Inspector.

9. To insure uniformity stamps furnished by the bureau only shall be used, and blank spaces, including that for signature, shall be filled in by the use of indelible pencil.

10. All identification cards heretofore issued, held by aliens who can not, or do not, meet the requirements of law, regulations and this order, will be taken up and canceled upon an incoming trip of the holder and appropriate action taken.

11. The work of validating outstanding cards should proceed slowly, systematically, steadily and persistently, and in such a manner as to avoid con-

fusion, congestion, interference with proper routine administration and the giving of just grounds for complaint upon the part of the traveling public.

12. The status of holders of identification cards shall be inquired into periodically, preferably every six months from date stamped, where practicable, but in any event not less frequently than once a year. When inquiry has been so made, it will be evidenced by a notation to show date of such inquiry and initials of the officer upon the reverse of the card. When the holder of a "nonimmigrant" identification card qualifies as an "immigrant," a new identification card shall be issued, stamped to show the correct status.

GEORGE J. HARRIS,
Acting Commissioner General.

Approved:
ROBE CARL WHITE,
Assistant Secretary.

APPENDIX B

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

* * * * *

UNITED STATES OF AMERICA, ON THE PETITION OF Preston M. Albro, on the Relation of John Graber, relator

against

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF Immigration, and Robert P. Clark, Inspector in Charge, United States Immigration Service, respondents.

* * * * *

Before

MANTON, SWAN, and AUGUSTUS N. HAND, *Circuit Judges.*

Appeals from the District Court for the Western District of New York. The relator sued out a writ of habeas corpus; writ dismissed; relator appeals. Complainant also sued the Director of Immigration, seeking to restrain him [from] interfering with his free passage to and from his home in Canada to the United States for the purpose of

engaging in or seeking employment. Complaint dismissed; complainant appeals.

Affirmed.

BOTSFORD, MITCHELL, ALBRO & WEBER,
Attorneys for Realtor-Appellant.
RICHARD H. TEMPLETON,
United States Attorney
for Western District of New York.
RICHARD A. GRIMM,
Assistant United States Attorney, Counsel.

MANTON, *C. J.*:

These appeals will be considered in one opinion.

John Graber, a native of Roumania, alleging that he resides at Niagara Falls, Ontario, Canada, presented himself before the Special Board of Inquiry at Niagara Falls, New York, on December 7, 1927, claiming the right to pass to and from Canada while he was seeking employment in the United States without having obtained an immigration visa. He claimed that he was not an immigrant, but a subject of Canada, and did not intend to reside in the United States but was only desirous of finding work here. He was again rejected by the same Board on April 5th, 1928, because he was not in possession of a consular immigration visa and because he was a person liable to become a public charge.

Both proceedings raised the question of his right to come and go, and the validity of General Order 86 promulgated by the Department of Labor June 1, 1927. He presented his passport, claiming that he was a nonimmigrant entitled to enter the United States for the purpose of seeking employment and requested the American Consul at

Niagara Falls, Ontario, for his visa. This was refused. We held in *United States ex rel. Cook* v. *Karnuth*, 24 Fed. (2d) 649, that the Jay Treaty of 1794 (8 Stat. 116), providing for a free temporary passage across the Canadian border, was in force and effect and that the Courts in construing the Immigration Act should conform to the provisions of that Treaty, and by its provisions British subjects residing in Canada, one of whom was seeking employment in the United States, were not immigrants within the meaning of the Immigration Act of 1924 (Sec. 3, U. S. C. A. Sec. 202) and that they were entitled to admission as temporary visitors for business purposes in accordance with the provisions of that Treaty. We said that business as therein used was not limited to trading and merchandising but embraced everything by which a man can be employed. The American Consul refused to visa the passport of this appellant because of Paragraph 48 of the General Instructions, Consular, 1925, which provides:

> Temporary visits, except under Rule 8 of the Immigration Rules, July 1, 1925, for the purpose of performing labor for hire are not considered to be within the purview of Sec. 3(2) of the Act. However, personal servants accompanying their employers who are tourists or business men visiting the United States on a temporary visit and leaving with them might be granted passport visas under the Section.

This regulation is in substance a reiteration of General Order 86. *The appellant, as a temporary visitor, was required to present to the Immigration*

authorities the visa pursuant to the Proclamation of the President, the last of which was issued on February 21, 1928, and as to nonimmigrants provides:

> With the exceptions hereinafter specified, they must present passports or official documents in the nature of passports issued by the Government of the countries to which they owe allegiance, duly visaed by consular officers of the United States.

The President's authority to make passport regulations is found in the Act of May 22, 1918 (40 Stat. 559) and is now in force by authority of the Act of March 2, 1921 (41 Stat. 1205, 1217). Such regulations must be consistent with the provisions of the Immigration Law. *Johnson* v. *Keating*, 17 Fed. (2) 50. The failure of appellant, as a nonimmigrant, to have his passport visaed by the American Consul is sufficient upon which to base a denial of his admission. *United States ex rel. London* v. *Phillips*, 22 Fed. (2d) 288. But he claims to be a subject of Canada because of his residence there and therefore to be entitled to benefits of the Jay Treaty. The question is therefore presented whether he was in fact a British subject within the meaning of the Jay Treaty. The Supreme Court considered the meaning of the word "subject" as used in the Immigration Law in *Nagle* v. *Loi Hoa*, 275 U. S. 475, a case arising under the Chinese Exclusion Act, providing that Chinese entering the United States shall "be identified by the Chinese Government or such other foreign government of which at the time such Chinese person shall be the

subject." It was held that the word "subject" was used in its narrow sense and indicated only those who by birth or naturalization owed permanent allegiance to the Government issuing the certificate.

In Pizzaro, 2 Wheat. 227, the Court gave a broader meaning of the term "subject" and held it included "A person domiciled in the country and enjoying the protection of its sovereign is deemed a subject of that country. He owes allegiance to that country while he resided in it, temporarily indeed if he has not by birth or naturalization contracted a permanent allegiance, but so fixed that as to other nations he follows the character of that country in war as well as in peace." But what was said in the Nagle case we think applies here, involving the question of immigration, where the word "subject" must be used in the narrower meaning. In *United States* v. *Carlisle*, 16 Wall. 147, it was pointed out that the citizen or subject owes absolute and permanent allegiance to his government and his sovereign or at least until by some open and distinct act he renounces it and becomes a citizen or subject of another government or sovereign. To be sure, while domiciled within a country he owes a local and temporary allegiance which continues during the period of his residence. But a British subject, within the meaning of this Treaty, means any person who owes permanent allegiance to the Crown and this is to be distinguished from the allegiance of an alien who, because he is within the British Dominion, owes temporary allegiance to the Crown. (Dicey on Conflict of Laws, 3rd Edition, P. 167.) This distinction finds support in the Law of Nations and is applicable to the Treaty between the British

Empire and the United States which we are here considering. It follows that the Court below properly dismissed the writ of habeas corpus and the complaint in the equity suit.

Order and decree affirmed.

No. 55197/874

APPENDIX C

DEPARTMENT OF LABOR,
OFFICE OF THE ASSISTANT SECRETARY,
Washington, October 13, 1924.

The Honorable The SECRETARY OF STATE.

MY DEAR MR. SECRETARY: I beg to acknowledge receipt of your letter of September 16 (A–4 102.9102/21) relative to the immigration situation on the Canadian border, particularly as it concerns the admission of seasonal labor from Canada for employment in Maine and New Hampshire.

This Department had already considered the possibility of waiving the immigration visa required in connection with Section 4 (c) of the Immigration Act of 1924 so far as temporary labor coming over the Canadian and Mexican borders is concerned, but, as you suggest, it would appear that this could be done only in the event that such laborers could be classed as aliens visiting the United States temporarily as tourists or temporarily for business or pleasure under Section 3 (2) of the Act. In other words, that such aliens could be regarded as nonimmigrants within the meaning of the new law.

Several inquiries and appeals were received from employers of seasonal labor from states on the Mexican and Canadian borders, but after most careful and sympathetic consideration the conclusion was reached that this was not a practical solu-

tion of the problem. This view was chiefly based on the fact that under the provisions of the contract labor law aliens coming to the United States as seasonal laborers could be admitted only when it was shown that they were not coming as the result of any contract or other inducement to perform labor in the United States. In other words, they could be admitted only if coming in search of employment, and this Department does not believe that laborers coming for that purpose could be considered as non-immigrants under Section 3 (2) of the Act. This would not apply in the case of skilled laborers who were being imported by employers under exception to the contract labor law as provided, but the ordinary agricultural laborers, such as customarily come from Mexico and Canada, are clearly not skilled laborers within the meaning of the general immigration law.

If this view of the situation prevails, and there seems to be no escape from it without a material modification of the law, the usual movement of seasonal laborers from Canada and Mexico could be expedited only by providing such consular facilities as would make it possible for them to secure the necessary immigration visas without going long distances from their homes. It is understood that such facilities are available along the Mexican border, but that this is not true of that part of the Province of Quebec adjacent to Maine and New Hampshire, which is the source of a very considerable annual immigration of temporary laborers and also of immigrants who come to the United States for a more permanent residence. In view of this, this Department is of the opinion that the situation can be solved or even favorably modified only

through the appointment of immigration officers or others as Vice Consuls for immigration purposes at or near the principal ports of entry for immigrants in the region last referred to. In view of the favorable reference to this proposal in your letter of September 16, this Department has communicated with the officer in charge of the Immigration Service in the district under discussion, and he now proposes, if the suggested plan is followed, that the following officers of the Immigration Service be designated as Vice Consuls solely for the purpose under discussion:

Edward A. Hart and Ernest S. Weldon, Jackman, Maine; Arthur A. Bourget, Chartierville, Quebec; Roy F. Kent, Fort Kent, Maine; Joseph A. Masse, Van Buren, Maine; John B. Johnson, Fort Fairfield, Maine; and Fred W. Arndt, Houlton, Maine. Houlton is the nearest to an American Consulate and can best be eliminated if elimination is necessary.

Your suggestion that an officer of the Department of State will confer with an officer of the Department of Labor upon this subject at any time is noted, and if you will designate some one in this connection, a representative of this Department will confer with him at any time.

I am, Sir, with great respect,

Very sincerely yours,

ROBE CARL WHITE,
Second Assistant Secretary.

○

Supreme Court, U. S.
FILED
JUL 21 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 198.

279

17

OCTOBER TERM, 1928

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF IMMIGRATION, AND CHARLES DREHER, INSPECTOR IN CHARGE UNITED STATES IMMIGRATION SERVICE, PETITIONERS,

v.

UNITED STATES OF AMERICA, ON THE PETITION OF PRESTON M. ALBRO, AN ATTORNEY, FOR MARY COOK AND ANTONIO DANELON, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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General Order Number 86, issued by the Department of Labor, Washington, on April 1st, 1927 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 198.

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF IMMIGRATION, AND CHARLES DREHER, INSPECTOR IN CHARGE UNITED STATES IMMIGRATION SERVICE, PETITIONERS,

v.

UNITED STATES OF AMERICA, ON THE PETITION OF PRESTON M. ALBRO, AN ATTORNEY, FOR MARY COOK AND ANTONIO DANELON, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Opinions Below.

The opinion of the District Court (R. 16) is printed on pages 30 to 40 of the Record. The opinion of the Circuit Court of Appeals (R. 49-53) is reported in 24 F. (2d) 649.

Jurisdiction of This Court.

The judgment sought to be reviewed was entered on March 12th, 1928. (R. 53.) Petition for certiorari was filed in this Court in June, 1928.

The jurisdiction of this Court to issue the writ prayed for is conferred by the Act of February 13, 1925, under section 240 (a) of the Judicial Code as amended.

Statement.

As shown by the return herein to the Writ, to which is attached the record of the Special Board of Inquiry, MARY COOK, is a British subject, residing in Canada, and desired on December 1st to enter the United States for the purpose of *seeking employment*.

ANTONIO DANELON is a native of Italy, but a citizen of Canada and a British subject, and desired on December 1st to enter this country for the purpose of *continuing his employment* at Niagara Falls, New York, where he had a position. Both are at present domiciled and intend to remain domiciled in the Dominion of Canada. Both were held by immigration officials when attempting to cross at the "*Peace*" Bridge, and examined by the Special Board of Inquiry on December 1st, and while in custody a writ of *habeas corpus* was issued by this Court. Later a second hearing was held before the Special Board of Inquiry, by virtue of a special order of the District Court on the ground that Mary Cook and Ontonio Danelon had not been given the right of counsel at the first hearing. The record of these inquiries is before the Court and discloses the fact that the aliens were refused admission to the United States on the ground that "they had no unexpired Consular Immigration

Visas, as required by the Immigration Act of 1924 and Rule 86," and from the decision of the immigration officials denying admittance to this Country on this ground, each of the aliens appealed.

The questions of fact were not disputed.

The questions of law were brought on for argument before the Hon. John R. Hazel, United States District Judge for the Western District of New York, and the Court held, folios 88-120 of the record herein:

(1) That a person entering the United States in the morning solely to work and to return in the evening to an adjoining foreign country is not a temporary visitor but is an immigrant,

(2) that even if that person is of British nationality, as are the Respondents herein, he is not protected by the Jay Treaty of 1794 and 1796,

(3) that the Jay Treaty, if effective, does not apply to British Nationals of other than Canadian birth, classified by Order 86 as immigrants, and seeking employment in the United States.

The errors assigned on appeal subsequently to the United States Circuit Court of Appeals were precisely to these points.

We believe that the learned District Court erred in its holding and that the opinion of the United States Circuit Court of Appeals in favor of the Respondents is right, and we urge upon this Court what we have urged below, as appears from our argument and brief herein.

Questions Presented.

The Court below decided that naturalized citizens of Canada or other British subjects domiciled therein are not immigrants within the meaning of Section 203, Title 8, U. S. C. A. of the Immigration Act of 1924, if coming into the United States to work or in search of work, without changing their domicile and removing to this country for the purpose of permanent residence.

That they had the right to enter the United States temporarily for business purposes and that they could not be excluded at the Border under General Order No. 86, effective July 1st, 1927, which, the Court below ruled, was issued without authority of law.

The Court held that the Jay Treaty of 1794, Article III, and the Explanatory Treaty Article of 1796, relating thereto, between the United States and Great Britain gives the right of free temporary passage across the Canadian border to His Majesty's subjects and to the citizens of the United States into the respective territories and countries of each.

It is this decision of the United States Circuit Court of Appeals in favor of the Respondents herein which the Petitioner seeks to have reviewed by this Court.

Attention of this Court is also called at this time to the fact that the said Jay Treaty was held to be valid and in full force and effect, a few days after the decision herein, in the case of United States *ex rel.* Diabo v. McCandless, on appeal March, 1928, Circuit Court of Appeals for the Third Circuit, Penna., as reported in 25 Federal (2nd), page 71.

The Solicitor General has stated the facts and the law of the case with commendable fairness. While we oppose his contentions, we agree with him that the position of the Petitioner herein is a weak one, and that the reasons for the opinion of the Court below are, as he says, well stated in the opinion of the Circuit Court of Appeals. We are also in accord when he states that the judgment of the Circuit Court of Appeals has much to support it, and that it is sustained by respectable authority.

We are also pleased to note that the Solicitor General concedes the important point in our favor that,—"if the provisions of the treaty pertinent thereto were not abrogated by war, the Immigration Act should not be construed to repeal the treaty, if that result reasonably may be avoided." (Page 12 of his Petition.)

The judgment of the Court below is founded upon two grounds; the Immigration Act standing alone and the Jay Treaty of 1794 and the Explanatory Treaty Article of 1796. Either point is sufficient to sustain the Court below, and we submit that the questions raised, having already been decided adversely to the contentions of the Petitioner by the judgments of two United States Circuit Courts of Appeal in Pennsylvania and the State of New York, do not possess sufficient merit to warrant a review by this Court.

We cannot conceive of this Court reversing the Court below in its conclusion based upon two entirely distinct and separate lines of reasoning. It follows that this judgment in all probability would be sustained. Therefore, we feel that nothing can be gained, neither to the petitioner nor to the United States at large, by a review in this Court, unless this Court should feel that the interests of the

United States require a more formal statement of its opinion herein than a denial of the petition for certiorari.

We rely upon and accept the facts and the law as set forth by the United States Circuit Court of Appeals in its opinion delivered in this case, in addition to the further material submitted in our brief herein, to support our contentions in opposition to those of the petitioner, and, in order to guide this Court in its final determination, we have reprinted our brief as submitted in the Court below, with some additional citations and references.

Argument.

POINT I.

General Order Number 86 is invalid and void as in contravention of the Immigration Acts.

(For the convenience of the Court, we will state at this time that italics in this brief are those of counsel, and that so far as possible, the references to sections of the statutes are to the United States Code Annotated.)

So far as material to the question involved herein, General Order Number 86, issued April 1st, and effective July 1st, reads as follows:

"1691

U. S. Department of Labor
BUREAU OF IMMIGRATION
Washington

No. 55479/537
55266/General April 1, 1927.

GENERAL ORDER No. 86

SUBJECT: Land border crossing procedure.

1. Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in

existing employment or to seek employment in this country *will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure*, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the '*immigrant*' class.

2. However, the following aliens of the said 'immigrant' class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessible on aliens entering permanently at the time of original admission, and, provided further, that they are not coming to seek employment."

The exceptions following do not in any way affect the two aliens in behalf of whom this writ was issued.

In substance this rule requires British subjects, crossing daily for work, to obtain consular visas and classifies such persons as "immigrants," where heretofore, up to the present time, such persons have been classified as "non-immigrants."

Such authority as rests in the Department of Labor at the present time to make any such regulations is contained in Chapter 6, Title 8, Section 102, U. S. C. A., the material part of which reads as follows:

"The Commissioner General of Immigration under the direction of the Secretary of Labor shall have charge of the administration of all laws relating to the immigration of aliens into the United States, and shall have the control, direction and supervision of all officers, clerks, and employees appointed thereunder. He shall establish such rules and regulations, prescribe such forms of bond, reports, entries and other papers and shall issue from time to time such instructions *not inconsistent with law*, as he shall deem best calculated for carrying out the provisions of this section and sections."

As to the power to make regulations we refer the Court to The Parthian, C.C.A. N. Y., 1921, 276 Federal, 903, from which we quote head note 3:

> "While the Commissioner may make regulations to enforce the Immigration Act, it was not permissible for the department to make or proclaim regulations which were beyond the powers delegated by the Congress to the Commissioner, by Section 23 of the Immigration Act (Section 959)."

This case was decided in the Circuit Court of Appeals, Second Circuit in 1921.

We also call the Court's attention to the case of *Merkle et al. v. Paschkes*, 123 Misc. 203; 204 N. Y. Supp. 102, which holds in substance, and we quote from the head note:

> "The Commissioner General of Immigration exceeded his powers under Immigration Law, Section 23, in formulating the rule that no attorney shall demand or receive compensation exceeding $25 for appearing in behalf of the United States, or of an alien, or aliens constituting one family applying for admission unless authorized to do so by the department or officer in charge of the immigration station; hence the rule is invalid as being legislation."

The broad principle is enunciated that a legislative body may not delegate its powers but may authorize an executive officer to adopt reasonable rules to carry out legislation which *it* has enacted.

Is it not legislation as in contradistinction to a departmental rule to classify as an "immigrant" one whom Congress has classified as a "non-immigrant" clearly and emphatically?

It is true that the authority given by Section 24 of the Immigration Act of 1924 to pass regulations omits words "***not inconsistent with law.***" Their insertion is, of course, not necessary in any event, but the later sections of the

Act of 1924 state that such act is to be construed as supplemental to the Act of 1917.

It is our contention that this regulation, promulgated pursuant to said section is beyond the powers of the Commissioner General of Immigration, acting under the Secretary of Labor, in that it contravenes the purpose and intent of Section 203 (U. S. C. A.) and is beyond the powers delegated by Congress. Not only that, but as we shall show later, in effect it nullifies Article 3 of the Jay Treaty of 1794, between Great Britain and the United States, which we believe we can demonstrate to the Court has never been abrogated.

Section 203, Title 8, Chapter 6, (U. S. C. A.) reads as follows:

> "'IMMIGRANT' defined. When used in this Chapter the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except * * * (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure."

There is then presented the question of law, as to whether or not an alien desiring to cross daily for employment is an "immigrant," as contended by the Petitioners or a "non-immigrant" as contended by us. If, as we contend, the Respondents are not immigrants, then they were entitled to their discharge because they were held upon a "conclusion of law" which cannot be supported upon the evidence adduced at the hearing.

It is our contention that the aliens at bar are entering the United States "temporarily for business."

The Department of Labor maintains that "business" does not include the ordinary vocations of man, but includes

only trading and merchandising. With this contention we are at odds. We refer to the Court the definition of "business" in *Corpus Juris*, and other text books, and cases cited thereunder. We quote from *Corpus Juris*, Volume 9, under heading "Business":

> "That which occupies the time, attention and labor of men for the purpose of a livelihood or profit; that in which one engages for the purpose of livelihood, profit, or the like; that which occupies the time, attention and labor of men for the purpose of profit or improvement; that employment which occupies the time, attention and labor; employment, etc., etc."

and we refer to the cases cited in the foot notes thereunder.

Business, "a very comprehensive term which embraces everything about which a person can be employed"; again "that which occupies the time, attention and labor of men for the purpose of a livelihood or profit, but it is not necessary that it should be the sole occupation or employment." It embraces everything about which a person can be employed, *Flint v. Stone Tracy Co.*, 220 U. S. Rep. 107, 111.

Business, "a very comprehensive term which embraces everything about which a person can be employed": See 220 United States Reports, page 111; 31 Sup. Ct. 342; 55 L. Ed. 389.

See also *re* above

People v. Commrs. of Taxes of New York, pages 242, 244, 23 N. Y. Rep. and the case of,

The Parker Mills v. Commrs. of Taxes, 23 N. Y. 244.

Also

Brown v. German-American Title & Trust Company, 34 Atl. 335, 343; 174 Pa. 443.

(ALL ABOVE CASES GIVE SIMILAR DEFINITIONS OF WORD.)

Business means, occupation or employment, see

Olson v. Ostby, 178 Illinois App. 176.

"The employment which occupies the time, attention and labour."

(See

Adam v. Musson, 37 Illinois App. 503.)

"Business is a word of large signification and denotes the employment or occupation in which a person is engaged to procure a living."

See

Goddard v. Chaffee, 84 Mass. (2 Allen), 395, 79 Amer. Dec. 796.

"The word BUSINESS is of large significance and denotes the employment or occupation in which a person is engaged to procure a living."

See

Allen v. Commonwealth, 78 N. E. 287, 288;—188 Mass. 59, 69 L. R. A., 599 (quoting and adopting the definition in the case of

Goddard v. Chaffee, 84 Mass. (2 Allen), 395, 79 Amer. Dec. 796.)

The word "business" in its BROAD SENSE embraces everything about which one can be employed, and in its NARROWER SENSE it signifies *a calling for the purpose of livelihood or profit:*

See

Easterbrook v. Hebrew Ladies Orphan Society, 82 Atl. 561, 563; 85 Conn. 289; 41 L. R. A. (N. S.) 615.

The decisions of the Courts of England are to the same effect, and are in line with the United States cases.

See the case of *Smith v. Anderson*, (1880), 15 Chancery Division, 258, where Sir George Jessel, Master of the Rolls, said:

> "*Business* itself is a word of large and indefinite import; it is a word of extensive use and indefinite signification; anything which occupies the time and attention and labour of a man for the purpose of profit is business; the legislature could not well have used a larger word."

In this connection we call the Court's attention to that part of the opinion of the District Court where it is stated at folios 114 and 115 of the record herein: "Congress did not use the word 'business' in its broadest sense or in a sense including daily labor or an occupation trade or calling for hire. It had in view a restriction of the broad term, 'business' as is clearly manifest from the general scope and purpose of the act."

We respectfully submit that upon these definitions it must be held that an alien who enters in the morning to follow his vocation and returns in the evening has made a *temporary entry* within the meaning of the statute, for the purpose of business.

If the Court, notwithstanding these definitions considers the definition of "business" by Congress ambiguous, then the definition given in the statute fails and the Court must construe the term "immigrant" according to the most obvious import of the language used. We do not believe that it will be necessary for the Court to go so far as to construe the term "immigrant," but if it should find it necessary, we respectfully submit the following:

From Corpus Juris, volume 2, under "Aliens," definition:

> "Immigration is the removing into one place from

another; the act of immigrating; the entering into a country with the intention of residing in it, etc.

"IMMIGRANT is a person who removes to a country for the purpose of permanent residence."

FROM WEBSTER'S NEW INTERNATIONAL DICTIONARY OF 1926:

"One that immigrates; one that comes to a country for the purpose of permanent residence; to settle."

FROM FUNK & WAGNALL'S NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE: 1923:

"One who or that which immigrates; a foreigner who enters a country to settle there; one who removes from one place to another."

FROM CHAMBERS' TWENTIETH CENTURY DICTIONARY:

"to migrate or remove into a country; one who immigrates."

The Courts have construed the meaning of "immigrant" on many occasions.

One of the leading cases is *Moffitt v. United States*, 128 Federal, 375, page 380. We quote from this case:

"'Immigrate' means to move into a country for the purpose of permanent residence. An alien immigrant to the United States is an alien who comes or removes into the United States for the purpose of permanent residence, but aliens composing the crew of a vessel visiting our sea ports are in no sense immigrants.

"'Immigration' is the passing or removing into a country for the purpose of permanent residence. The legislation contained in the various statutes that have been passed, relating to immigration, is clearly directed against the immigration into this country of certain classes of persons who come in with the intent of entering into and becoming a part of the mass of its citizens or population."

The reason that the immigration officials are holding these aliens to be "immigrants" is solely the fact that the Secretary of Labor in conjunction with the Commissioner General of Immigration promulgated the General Order 86,

above referred to. That is, in accordance with the Order, these aliens are not to be considered as "visiting the United States temporarily as tourists" or "temporarily for business."

If an immigrant is a person who desires to change his domicile, then the aliens in whose behalf this writ is obtained *are not* "immigrants." ***Can it be assumed that Congress in defining the term "Immigrant" intended to do violence to the accepted meaning of the word and the obvious import of the language used? We think not.*** It is self-evident that an administrative official cannot by his own act change the definition of Congress. (We call attention again to the fact that the definition of "immigrant" in Section 203 is in substance—one who comes from without the United States to the United States *except* temporarily for business.) That aliens of this class are not immigrants was decided adversely to the Government in this District Court thirty-six years ago in the case of *U. S. v. Michigan Central R. R. Co.*, 48 Fed. 365, when the Government attempted to fine the Michigan Central Railroad Co. for bringing a telegraph operator into Niagara Falls, N. Y., from Canada, to work for the company at Niagara Falls. This case was a proceeding by the United States to recover a penalty from the Michigan Central R. R. Co. for alleged violation of the Contract Labor Law, based upon the fact that the railroad, at its Niagara Falls, N. Y., office employed a telegraph operator who resided in Canada, and that it had full knowledge of the fact that he did so reside.

The Contract Labor Law then, as now, prohibited the *immigration* into the United States of laborers under contract. There was no question that the employee, Mr. Blant,

resided in Canada and came to the United States to work. The question was whether the railroad had induced him to "*migrate*" to the United States under contract of employment. On this issue, the court said *verbatim:*

> "*Mr. Blaut was not an immigrant because he did not come here intending to acquire a permanent or a temporary home.*"

This is the condition under which the **commuters** on the Canadian border enter the United States; they return in the evening to their homes in Canada. It follows that the immigration authorities not only are wrong when they attempt *to classify* such people as "immigrants" but they are acting contrary to the decision of the Courts which decided the question adversely to them thirty-six years ago.

It seems to follow that General Order 86, which raises the same condition, should be dealt with in the same way as the complaint against the Michigan Central. The aliens in this case are "non-immigrants" under the Statute, and cannot be made "immigrants" merely by *departmental order*, contrary to the intent of the Act of Congress. It follows that the writ should be sustained on this point alone.

The exceptions stated in Rule 86, which Counsel for the Government contends ameliorates its apparent harshness, soften it in no way in the particular case of either of these Respondents, as they do not come within the exceptions.

The District Court referred on the argument herein to the question of the rule itself having provided an opportunity of six months for British subjects intending to *immigrate* into this country to secure the Consular Vise. This is true. When it was seen on or about November 28th that a great hardship was to be worked upon many British subjects

whose quota number did not entitle them to enter into the United States, an order was issued allowing them to cross pending the reaching of their number on the Quota List (this, as a matter of fact, retards others who are waiting) *but* it, in no way, applies to British subjects in Canada who do not desire to *immigrate*, but only desire the border crossing privilege to and fro. The Consular Vise and numerical limitation was never intended for the purpose of mere border crossing, and statements are required showing *an intention to change domicile*. Thus, those British subjects who have not a bona fide intention of a dwelling in the United States must either falsify or be deprived of the border-crossing privilege.

Bluntly put, General Order 86 classifies as an "immigrant" a person who under Section 203 U. S. C. A. was specifically made a "non-immigrant". This, we respectfully submit, is "inconsistent with the law" as provided in Section 102, and, in addition, has the momentous effect of violating a solemn treaty between Great Britain and the United States.

We have examined the Immigration Act with care, and we can find no word which indicates an intent on the part of Congress to override the provisions of any existing treaty with Great Britain. Unless there is such a clear intent found in the statutes, or even if the Court is in doubt on that subject, then all the provisions of the Jay Treaty may be brought before the Court as pertinent to this issue.

POINT II.

The Treaty between Great Britain and the United States, known as the Jay Treaty of 1794, prevents the exclusion of these aliens.

The Relators herein claim the right of free, temporary passage across the Canadian border under Article III of the Treaty of Amity, Commerce and Navigation of 1794, commonly called the Jay Treaty, and the additional, "Explanatory Article" of 1796, the pertinent portion of which reads as follows:

> **"It is agreed that *it shall at all times be free* to His Majesty's subjects, and to citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, *freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other.*" '**

Note specially the above words, "it shall at all times be free," in contradistinction to word "freely" in later part of the clause.

By Article 28 of the Treaty of 1794, it was provided that the first ten articles of the Treaty were to be permanent. See Article 28, first line, which says: "It is agreed that the first ten (10) articles of this treaty shall be permanent." The other articles all expired by their own time limitation. (See Moore Digest of International Law, Vol. 5, page 372.)

***(For Jay Treaty of* 1794, *see Volume One* (1), *of "Treaties, Conventions, Agreements,"* 1776 *to* 1909, *by William M. Malloy, of the State Department at Washington, at pages* 590 *to* 606, *and pages* 607 *to* 609, *for the additional "Explanatory Article" of* 1796.)**

At this point we respectfully submit that if this Court should be in doubt as to whether or not the Act of Congress,

known as the Immigration Act, shows the slightest intention of nullifying, or is in any way inconsistent with the Jay Treaty, may we respectfully submit the following authorities governing the general proposition of whether or not an Act of Congress supersedes a previous treaty.

A treaty may supersede a prior Act of Congress, and an Act of Congress may supersede a prior treaty.

The Cherokee Tobacco Case, 11 Wallace, 616 at page 621.

It is not sufficient to urge against an Act of Congress that it conflicts with or violates a prior treaty. A treaty has no superior sanctity over an Act of Congress. (Head Money Cases, 112 U. S. 580.) It is true that Courts will be slow to assume that Congress intends to violate a treaty right. (*United States v. Mrs. Gue Lim*, 176 U. S. 459; *Chew Heong v. United States*, 112 U. S. 536); but in case of an *irreconcilable conflict* between an Act of Congress and a Treaty the last in date will prevail.

Hijo v. U. S., 194 U. S. 315, at page 324.

A Treaty is of equal force with Acts of Congress; Ex. P. Scherer, 195 Fed. 334.

Treaties the Supreme Law of the United States; see *U. S. v. Rauscher*, 119 U. S. 407; *Court v. Hawes*, 113 Bush. 697; *Blanchford v. State*, 10 Tax App. 627.

Treaties and Acts of Congress stand on an equal footing as the Supreme Law of the land; *General Electric Company v. Robertson*, cited in 21 Fed. (2nd) 214, 215.

If clear and explicit, an Act of Congress must be upheld by the courts even in contravention of express stipulations in an earlier treaty.

***Fong Yue Ting v. United States*, 149 U. S. 698 at page 720.**

This, we believe, is the leading case on this particular phase of the subject, and would be cited by the Government if the Government's Counsel could show any intent upon the part of Congress by the Immigration Act to abrogate this treaty, or this were a question of immigration. (We do not refer to Rule 86, which we hold not an Act of Congress.)

In that case it was stated, in the course of the opinion by Mr. Justice Gray:

> **"In our jurisprudence it is well settled that the provisions of an Act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, *if clear and explicit*, must be upheld by the Courts, even in contravention of express stipulations in an earlier treaty."**

The Court will recall that this case dealt with the broad question of Chinese exclusion and the provisions of a previous treaty with China, and specifically with the registration of Chinese residents in this country. The burden was thrust upon the United States Supreme Court of sustaining the validity of an Act of Congress which the Chinese said was contrary to the provisions of a previous treaty with China. Since the ratification of that treaty, in certain states, the importation of Chinese labor had caused conditions to arise detrimental to the interests of the citizens of the States and of the United States. These aliens failed to conform to the customs of our country and the whole problem was one

of the ability of the two races to live congenially together in the same localities. It involved the question of *permanent domicile* within the United States. The Act of Congress in question did clearly show an intent to abrogate the provisions of a previous treaty, and was held to do so. A reading of the decision shows that the United States Supreme Court in that case had the underlying thought of *justification by the circumstances*. In this case we have no such question of social welfare to our inhabitants, for we are dealing with temporary entrance and exit from the country of our friends in Canada, and not with the problem of the permanent immigration of a foreign race who cannot for ages adapt itself to our life and customs, or we to theirs.

We further respectfully submit that repeals by *implication* are not favored, as shown in the case of *Johnson v. Browne*, 205 U. S. 309, at page 321, and Acts of Congress *are always to be construed so as to conform to the provisions of a treaty if it is possible to do so.*

United States v. Whiskey, 108 U. S. 491, at page 496.

Rights granted under a treaty will be held to be in force unless clearly annulled by an Act of Congress.

Cheung Sum Shee v. Nagle, 45 Sup. Ct. 539.

"The Immigration Act (8 U. S. C. A.), and Prussian Treaty of May 1st, 1828 (8 Stat. 378), should, if possible, be construed so that both can stand together and be given effect." *Hempel v. Weedin*, 23 Fed. Rep. (2nd) March 22nd, 1928, page 949, citing the *New Haven* case at page 955.

See also to same effect the case of *Powers v. Comly*, 101 U. S. Rep. 101.

Any possible theory by which both can be in force must be adopted, if a reasonable construction can be given to both.

Ward v. Race Horse, 163 U. S. 504.

In the case of *Whitney v. Robertson* (1888) 124 U. S. 190, at page 194, Mr. Justice Field said:

> "When the two relate to the same subject, the Courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."

The quota act must be construed with the view of preserving treaty rights of aliens, unless they are clearly annulled. They are aliens entitled to enter in pursuance of a treaty.

Cheung Sum Shee v. Nagle (Cal.) 1925, 45 S. Ct. 539; 268 U. S. 336, 69 L. Ed. 985.

And in the case of the *United States v. Schooner Peggy* (1801), 1 Cranch, U. S. 103, 109, Chief Justice Marshall, pronouncing the decision of the Court, said:

> **"The Constitution of the United States declares a treaty to be the Supreme Law of the land. Of consequence, its obligation on the Courts of the United States must be admitted."**
>
> **"Where a treaty is the law of the land, and as such affects the rights of the parties litigating in Court, that treaty as much binds those rights, and is as much to be regarded by the Court as an Act of Congress."**

A Treaty is the law of the United States of which all courts, State and National, are to take judicial notice; *U. S. v. Rauscher*, 119 U. S. 407, 425.

The construction of a Treaty is for the courts, which are not bound by the construction of the executive or diplo-

matic branches of government; *Ex. P. Charlton*, 185 Fed. 880; aff. 229 U. S. 447, 449, 33 S. 945; (1912). *U. S. v.* Greene, 146 Fed. 766.

On this question of revocation, or rather, paralyzation of treaty rights by subsequent Congressional action it is interesting to read the opinion of the District Court for the Eastern District of Michigan, Southern Division, in the case of *Hiram Walker & Sons, Ltd., v. Lawson, Collector of Customs and Internal Revenue*, 275 Fed. 373. Therein Walker & Sons, Ltd., made an attempt to ship carloads of intoxicating beverages through United States territory under bond, and the two defendants attempted to prohibit them from doing so under the provisions of the Volstead Act. The claim was made that the Volstead Act prohibited such shipment. The Court states, at pages 376 and 377, verbatim:

> "It is another established and recognized principle of statutory construction that repeals by implication are not favored, and that a later statute will not be held to have impliedly repealed an earlier one, unless full effect cannot be reasonably given to both. *United States v. Lee Yen Tai*, 185 U. S. 213, etc.
>
> "It is equally well settled that a treaty between the United States and a foreign country will not be regarded as abrogated, and rights thereby created taken away, by a subsequent statute, by implication, unless an intention to that effect is clearly and unequivocally indicated by the necessary operation of such statute, it being presumed, until the contrary is plainly manifest, that Congress intends no interference with such treaty rights; and it is only where the provisions of a treaty and the terms of a later statute are in irreconcilable conflict, and can not both remain in force, that the former will be considered as impliedly repealed by the latter. *Chew Heong v. United States*, 112 U. S. 536, etc."

The right of Canadian citizens to pass and repass in the manner *allowed by the Jay Treaty*, and in which these

aliens attempt to pass and repass, has not been *expressly* taken away nor, *is* an intention to that effect indicated by the Immigration Act, as required by the decisions of the highest courts. The Jay Treaty and the Immigration Act are not inconsistent; both can be reconciled, the Immigration Act being made to apply to aliens generally, or aliens intending permanent entry, except those governed by the special provisions of the Jay Treaty, upon the principle that when dealing with similar matters a special act prevails over or overrides a general act, unless it is expressly and specifically declared otherwise. **The Jay Treaty is not an immigration matter at all, but is a mutual border-crossing right and entry privilege specially agreed upon by and between Great Britain and the United States in and for their own special interests.**

The United States Supreme Court, in the year 1823, had occasion to consider the question of whether the Jay Treaty was terminated by the war of 1812 between the United States of America and Great Britain, and decided it was not abrogated. This case is also referred to in *Hempel v. Weedin*, 23 Fed. Rep. (2nd) March, 1928, at page 955.

Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven, et al., 8 Wheaton, 464, 5 L. Edition U. S. Rep. 662.

The opinion of the Court was written by Mr. Justice Washington. Said the Court, at page 494:

> "But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations dealing in general terms in relation to this subject, we are satisfied that the doctrine contended for

is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits and acknowledged our independence would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but at most are only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."

Professor Charles C. Hyde, formerly counsellor of the State Department at Washington, and now professor of International Law at Columbia in New York, in his work on International Law (1922), Vol. 2, page 93, says that the views of the Supreme Court of the United States in the above New Haven case, "*are believed to be an impressive enunciation of sound principle.*"

It is true that certain clauses of the treaty expired by their own limitations, but the first ten, it appears, were made permanent by a provision in Clause 28. (See Malloy, "Treaties and Conventions," Vol. 1, above referred to, and the note on page 580 thereof, at bottom of page, citing the foregoing New Haven case as the leading authority as to the effect of the War of 1812 on Treaties of United States with Great Britain and note at bottom of page 590.)

Bearing on this question, it is worthy of more than passing notice to remember that the United States Government has acquiesced in the crossing and recrossing border privileges, and they have been acted upon and in operation with the full knowledge of the United States Authorities, without objection, ever since the year 1794, and down to and including April 1st, 1927, or for a period of one hundred and thirty-three years. The United States Government has thus recognized the existence of that treaty and of the rights and privileges granted thereunder to all British subjects, and to citizens of the United States.

We also wish to point out that the Solicitor-General of the United States, in his petition and supporting brief for a writ of certiorari herein, on appeal to the Supreme Court of the United States, filed in June, 1928, referring to the Immigration Act of 1924, admits, on pages 9, 11 and 12, that: "For nearly three years after that Act was passed, aliens residing in Canada were allowed to cross daily to work, on the theory that they were not immigrants."

"It must be admitted that the decision below has much to support it, and the fact that the Department of Labor so construed the Act of 1924 from its passage until April 1st, 1927, is not to be overlooked."

We also respectfully submit that the *burden in this case is upon the Government to show that there was an intention by the passage of the Immigration Act to abrogate Article III of the Jay Treaty.*

At about the same time as the decision in the New Haven case and in the year 1830 there arose in England the case of *Sutton v. Sutton*, Volume 1 Russell and Mylne Re-

ports, page 675, where the Master of the Rolls, Mr. Justice Leach of the Court of Chancery, decided that the treaty of 1794 was still in full force and effect, and that the War of 1812 did not end or abrogate the treaty. He cites the New Haven case and says:

> "The relations which had subsisted between Great Britain and America, when they formed one Empire, led to the introduction of the ninth section of the Treaty of 1794, and, the privileges of natives being reciprocally given not only to the actual possessors of lands but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should not depend upon the continuance of a state of peace."

(Same case also cited by Professor J. B. Moore in his International Law Digest, Vol. 5, paragraph 779, pages 373, 374.)

In an official publication of the United States Government, known as the Treaties and Conventions between Great Britain and the United States 1776 to 1887, issued under the authority of the Forty-eighth Congress, second session, at page 1228, it is stated that treaties do not, *ipso facto*, become extinguished by war, and it refers to the New Haven case above mentioned as authority. Professor Wheaton, a leading American authority on International Law, and a former Minister to foreign countries for the United States Government, says the same thing; while Chancellor Kent, one of the greatest judicial authorities of the United States, points to Clause 10 of the Jay Treaty of 1794 as proving conclusively that the War of 1812 did not cancel that treaty, and also refers to the American and English cases above mentioned.

Professor Woolsey, International Law, 6th Edition (1897), 263, one of the foremost authorities in the United States, who held the chair of International Law at Yale University for thirty years, agrees that the treaty was not abrogated, and Professor John Bassett Moore, probably the most eminent outstanding authority on International Law today in the United States, now one of the judges on the Permanent Court of International Justice, says that Article 9 was not annulled by the War of 1812, and is one of the permanent clauses of the Jay Treaty. Moore says, Vol. 5, 382, 383:

> "It may be affirmed that the proposition that all treaties are extinguished or annulled by war is unsupported by authority at the present time."

See Volume 5 Moore's Digest of International Law (1906) pages 372, 376 to 380, 382, and his Article in Volume One of the Columbia Law Review at page 213, regarding the effect of war on treaties. In Volume 5 he said that the Jay Treaty, Article 10, also operated during the War of 1812, and survived that war. See also Chancellor Kent's Commentaries on International Law, which supports Judge Moore. Kent says (Abdys edition), pages 393 and 394:

> "The tenth (10th) article of the treaty between the United States and Great Britain, in 1794, may be mentioned as an instance of a stipulation made for war. It provided, that debts due from individuals of the one nation to those of the other, and the shares or moneys which they might have in the public funds, or in public or private banks, should never, in any event of war, be sequestered or confiscated. *There can be no doubt that the obligation of that article was not impaired by the War of 1812, but remained throughout that war*, and continued binding upon two nations, until they should mutually agree to rescind the article; for it is a principle of universal jurisprudence, that a compact cannot be rescinded by one party only, if the other

party does not consent to rescind it, and does no act to destroy it."

On April 23rd, 1898, upon war breaking out between the United States and Spain, the Spanish government issued a decree declaring, among other things, that all treaties were terminated with the United States. This included a treaty of the year 1795, which contained certain permanent clauses, and the United States refused to allow or recognize this contention by Spain. Mr. John B. Moore, who was then acting Secretary of State, sent a despatch in which he said: "If it were true that war abrogates such stipulations, they would be subject to the singular fate of ceasing to be in force whenever they should become applicable."

The result was that the permanent provisions of the 1795 Treaty remained in force, and were adhered to and carried out, and Spain did not abrogate it. (See Moore International Law, Vol. 5, pages 375, 376.)

Perhaps one of the most recent and striking examples of a determination of this question was the insistence of the United States Government that treaties were not abrogated by war, when this question arose after the war with Spain.

In 1899 the United States Government demanded that Spain carry out the terms of the Treaty of Madrid, of February 17, 1834, regarding payment of certain annual indemnities and claims of American citizens. Spain replied that the War of 1898 with the United States had terminated this old treaty. The United States Government answered that they refused to admit any such contentions, *because Spain's obligation under the treaty was made permanent*

and the United States Department of State informed Spain that the Treaty of 1834, *being perpetual* in its nature, was not terminated or affected by the War of 1898, and as a result all the payments were made by Spain under the treaty as demanded. Here is an instance where, by Article 29 of the Treaty of Madrid, of July 3rd, 1902, made after the war with Spain, and after the Treaty of Paris of 1898 was signed, in which no provision was made regarding existing treaties, it is declared that all treaties, agreements, contracts and conventions between the United States and Spain, prior to the Treaty of Paris of 1898, should be "expressly abrogated and annulled," with the exception of the 1834 Treaty. And in this instance treaties existing prior to a war were terminated by a new treaty over three years after the treaty of peace was signed at Paris in 1898. See Prof. George G. Wilson of Harvard University, International Law, 1927 Ed. 208 and 430; Hyde, International Law, Vol. 2, page 92; Moore, International Law, pages 377, 378, 379.

The United States Senate passed a Resolution on February 8th, 1919, requesting information as to the effect of certain proposed congressional legislation on any treaty rights then in force, and in answer to this resolution, the Acting Secretary of State, on March 27th, 1919, quoted Article III of the Jay Treaty of 1794 as one of the treaty provisions which might be affected by legislation giving preferential treatment to Americans or American ships.

Regarding this Article III, it was then stated that:

> "The treaty from which the above quoted article is taken contains no provision for abrogation; hence, agreement by the parties thereto would seem to be necessary effectively to accomplish its abrogation as an international agreement. No action has been taken by either government looking to abrogation."

In order to further show and prove our contention to be right, and that the Jay Treaty of 1794 is still in effect and exists as a living force, and that it is a most important document for both nations and their interests, we ask the Court to consider for a moment Article number 5 of the Jay Treaty, which says:

> "Whereas doubts have arisen what river was truly intended under the name of the St. Croix River, mentioned in the said Treaty of Peace, and forming a part of the boundary therein described; that question shall be referred to the final decision of commissioners to be appointed in the following manner, etc., etc., etc."

By this 5th clause or article of the Jay Treaty of 1794, which Article it will be remembered is one of the ten (10) permanent clauses of that Treaty, provision is made for the appointment of three commissioners to determine the St. Croix River, and in accordance with these provisions of the said 5th Article the Commissioners met at Halifax, in the Province of Nova Scotia, Canada, in March, 1798, and determined the River St. Croix, but left unsettled the place of its source; this was left in dispute until the year 1842.

(See "American Diplomacy, Treaties and Topics," at page 73 (1894); being a treatise by the late Professor Freeman Snow, formerly head of the Department of International Law and Diplomacy at Harvard University.)

Now, in the year 1842 a Treaty was entered into between Great Britain and the United States for the purpose among other things of settling and accurately defining the boundaries between the possessions of Great Britain in North America and the Territories of the United States.

This Treaty was concluded on August 9th, 1842, and proclaimed November 10th, 1842, and is known as the Webster-Ashburton Treaty.

By Article one (1) of that Treaty of 1842, the Treaty of Peace of 1783, and the Jay Treaty of 1794, are all treated as interdependent upon each other, and referred to and dealt with as valid and subsisting documents and still in full force and effect, and regarded as governing the final settlement, fixing, determination and location of the true boundary lines of the possessions of the nations referred to in North America, and as to the exact location of the said River St. Croix and the true place of its source.

In connection with the said boundaries and the St. Croix River, Article one (1) of the said 1842 Treaty declares, among other things, that:

> "It is hereby agreed and declared that the line of boundary shall be as follows: Beginning at the monument at the source of the River St. Croix as designated and agreed to by the commissioners under the fifth (5th) Article of the Treaty of 1794, between the Governments of the United States and Great Britain, etc., etc., etc."

Article one (1) of the 1842 Treaty also refers to, incorporates and uses the Jay Treaty of 1794 as one of the vital documents in a chain of evidence necessary to properly and accurately fix, locate, determine, and settle certain portions of the whole boundary line between the United States of America and the British Dominions and possessions in North America, under and by virtue of the Treaty of Peace of 1783 to which the Jay Treaty of 1794 and the Webster-Ashburton Treaty of 1842 refer, as will be seen by reference to the said Treaty Articles, and to the provisions of the said Treaty of 1842, Clause (1).

This shows conclusively that the Treaty of Peace of 1783, and the Jay Treaty of 1794, are necessary and vital parts of the later Webster-Ashburton Treaty of 1842,

in order to complete the boundary lines and determine the rights of each nation, and in regard to the said River St. Croix, and both Treaties therefore become embodied into and are treated and made living parts of the later 1842 Treaty, both by reference thereto and incorporation therein.

Note especially the words in the 1842 Treaty, Article one (1), which refer to the Treaty of Peace of 1783, and also to the words which say: "as designated and agreed to by the commissioners under the fifth (5th) Article of the Treaty of 1794."

Of what possible use, benefit or service could these references be if the Jay Treaty of 1794 were not still treated as permanently binding upon both nations, as it is in fact stated to be by express words both in the Treaty itself, and in the later 1796 Explanatory Treaty Article referred to herein?

These references show conclusively that the Jay Treaty must be looked at and read with and into the later 1842 Treaty in order to get the true meaning and settlement regarding the boundaries of the two nations and of the said River St. Croix.

If the Jay Treaty had ever been abrogated or nullified such references would be absurdities, and it is not a reasonable conclusion to arrive at under these circumstances, that the eminent statesmen who negotiated the 1842 Webster-Ashburton Treaty, after mature and considered deliberation between the two nations, based their determination and adjustment upon the terms and provisions of an abrogated and non-existent Treaty made between the same two great nations some years before.

On the contrary, it proves to a demonstration that the Treaty of Peace of 1873, and the Jay Treaty of 1794, were incorporated into and made a part of the Treaty of 1842, and were regarded by these statesmen as integral parts of and important links in the chain of evidence and settlement finally made and agreed upon regarding the fixing, location and final determination of the said boundaries between the possessions of the two nations on the continent of North America.

(For authorities and Treaties on this matter, see the Volume of Treaties and Conventions between the United States and other powers, 1776 to 1887, Washington Government Printing Office, 1889, page 433, and also see, "Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers, 1776 to 1909," by William M. Malloy, Volume one (1), pages 650 and 651 for 1842 Treaty, and references therein to the Treaty of Peace of 1783 and to the Jay Treaty of 1794; and see Snow, "American Diplomacy—Treaties and Topics," pages 82 and 83, for summary of the 1842 Treaty.)

From the foregoing, we believe that we are right in our contention that the Jay Treaty, in so far as its features were made permanent, by its own terms and provisions is still in full force and effect.

Private Correspondence.

Private correspondence concerning a treaty subsequent or prior to its negotiation is always of weight in determining the purpose of the treaty itself. The question whether a treaty is terminated in whole or part by war be-

tween the contracting parties has been the subject of much discussion.

It was discussed at considerable length in correspondence between John Quincy Adams, American Minister to Great Britain and the British Foreign Office in the year 1815-1816, with regard to the question of the effect of the War of 1812 between the United States and Great Britain upon the provisions of the third article of the Treaty of Peace of 1783, relating to the liberty granted to citizens of the United States to take fish in Canadian territorial waters and to use certain parts of the neighboring coasts for the purpose of drying and curing fish. In a note of October 30, 1815, from Lord Bathurst to Mr. Adams, Lord Bathurst, in contending that the treaty provisions just mentioned had been terminated by the War of 1812, said:

> "It has been urged, indeed, upon the part of the United States, that the treaty of 1783 was of a peculiar character, and that, because it contained a recognition of American independence, it could not be abrogated by a subsequent war between the parties. To a position of this novel nature Great Britain cannot accede. She knows of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties."

In the same note Lord Bathurst made the following statement, which does not seem to be entirely consistent with the statement just quoted:

> "It is by no means unusual for treaties containing recognitions and acknowledgments of title, in the nature of perpetual obligation, to contain, likewise, grants of privileges liable to revocation. The treaty of 1783, like many others, contained provisions of different characters—some in their own nature irrevocable, and others of a temporary nature. If it be thence inferred that, because some advantages specified in that treaty would not be put an end to by the war, therefore all

the other advantages were intended to be equally permanent, it must first be shown that the advantages themselves are of the same, or at least of a similar character; for the character of one advantage recognized or conceded by treaty can have no connection with the character of another, though conceded by the same instrument, unless it arises out of a strict and necessary connection between the advantages themselves. But what necessary connection can there be between a right to independence and a liberty to fish within British jurisdiction, or to use British territory? Liberties within British limits are as capable of being exercised by a dependent, as by an independent state, and cannot, therefore, be the necessary consequence of independence."

In his reply of January 22, 1816, Mr. Adams made the following statements:

"The position that 'Great Britain *knows of no exception* to the rule that all treaties are *put an end to* by a subsequent war between the same parties, appears to the undersigned not only novel, but unwarranted by any of the received authorities upon the laws of nations; unsanctioned by the practice and usages of sovereign states; suited, in its tendency to multiply the incitements to war, and to weaken the ties of peace between independent nations; and not easily reconciled with the admission that treaties not unusually contain, together with articles of a temporary character, liable to revocation, recognitions and acknowledgments *in the nature of perpetual obligation.*

* * *

On this point, the undersigned would refer Lord Castlereagh to *the tenth (10th) article of the Treaty of 1794* between the United States and Great Britain, wherein it is thus stipulated: 'Neither the debts due from individuals of the one nation to the individuals of the other, nor shares, nor moneys, which they may have in the public funds, or in the public or private banks, shall ever, *in any event of war*, or national differences, be sequestered or confiscated.' If war puts an end to all treaties, what could the parties to this

engagement intend by making it formally an article of the treaty? According to the principle laid down, excluding all exception, by Lord Bathurst's note, the moment a war broke out between the two countries this stipulation became a dead letter, and either State might have sequestered or confiscated those specified properties, without any violation of compact between the nations."

* * *

"The undersigned believes that there are many exceptions to the rule by which the treaties between nations are mutually considered as terminated by the intervention of a war; that these exceptions extend to all engagements contracted with the understanding that they are to operate equally in war and peace, or exclusively during war; to all engagements by which the parties superadd the sanction of a formal compact to principles dictated by the eternal laws of morality and humanity; and, finally, to all engagements which, according to the expressions of Lord Bathurst's note, are *in the nature of perpetual obligation*. To the first and second of these classes may be referred the tenth article of the treaty of 1794, and all treaties or articles of treaties stipulating the abolition of the slave trade. The treaty of peace of 1783 belongs to the third." American State papers. Foreign Relations, Vol. IV, pages 354-355, 357.

On the subject of whether or not Article III of the Jay Treaty is still in effect, we should like to present to the Court the decision in a very recently decided case, namely *United States ex. rel. Diabo v. McCandless*, 18 Federal (second series) 282, and on appeal, March, 1928, C. C. A. 3, in 25 Fed. (2d) 71. This involved the right of an Indian on a Canadian Reservation to come permanently into the United States. That involved not the right of a Canadian Indian, under the treaty, to come into the country temporarily, but permanently, and in the argument by the Government it was contended that if Article III of the Jay

Treaty was still unabrogated, that even then it would give no right to a Canadian Indian to come into this country *permanently*. The Court held that regardless of the Treaty the Indian had a right to come permanently and an appeal was taken by the Government from this decision, which decision the United States Circuit Court in Philadelphia has now sustained, and has also decided that the Jay Treaty, Article 3, is still in force and valid. (25 Fed. (2nd) 71).

In that case the Government took the view that Canadian Indians may come in temporarily but not permanently. We submit, however, that the decision in the *Diabo* case is right and that they may 'freely pass and repass,' and come and go as and when they please under the Jay Treaty, in common with all British subjects in Canada. That is exactly the position we take in the case of these Canadian white people, who are British subjects, and *we urge it as worthy of adoption by this court.*

The opinion of the District Court in this case states:

"At the time the boundary line between the United States and the now Dominion of Canada was fixed and located by agreement with Great Britain, the line was run in large part through what may be termed Indian territory in the sense of lands, the right of occupancy of which was recognized by both the contracting parties to be in the Indians. The boundary line to establish the respective territory of the United States and of Great Britain was clearly not intended to, and just as clearly did not, affect the Indians. It made no division of their country. THE JAY TREATY OF 1794 RECOGNIZED THIS FACT in the provision that THE INDIANS RESIDING ON EITHER SIDE OF THE LINE, which as between the United States and Great Britain was established as a boundary line, SHOULD BE UNAFFECTED IN THEIR RIGHT TO PASS THIS LINE AT WILL. It has been argued to us pro and con that this treaty was abrogated by

> the War of 1812. We do not see that the rights of the Indians are in any way affected by the treaty, whether now existent or not. The reference to them was merely THE RECOGNITION OF THEIR RIGHT, which was wholly unaffected by the treaty, EXCEPT THAT THE CONTRACTING PARTIES AGREED WITH EACH OTHER THAT EACH WOULD RECOGNIZE IT. The right of the Indians remained, whether the agreement continued or was ended. The question of the right of the Relator to enter the territory of the United States does not turn upon any treaty with Great Britain, although, of course, if we have an agreement to permit him to enter, we will make good our promise, unless it has been duly revoked."

Upon appeal in March, 1928, the above decision of the lower Court was affirmed, and the Jay Treaty of 1794 held to be in force: See 25 Fed. (2nd) 71 (C. C. A. 3).

We contend that the same right of freedom of passing and repassing across the boundary line, possessed by the Indians as mentioned in the above case, also applies to British subjects and citizens of the United States and all others exercising and entitled to this privilege and this right, under the Jay Treaty, which Treaty two United States Circuit Courts of Appeal have now decided to be valid and in force.

Abrogation Has Been Sought by Neither Party to the Treaty.

It would seem further that International Law and Practice require that the United States Government must first ask for the abrogation of the Jay Treaty before it can legally enforce the border regulations of Order 86 against

British subjects in Canada, who desire to exercise their rights under the treaty, which are, both in United States and Great Britain held to be still in force. More especially is this true where these rights and privileges have been exercised under that treaty for upwards of 133 years, since 1794, without objection, and acquiesced in during all that period of time by the United States authorities.

It is respectfully submitted that under such circumstances it will require the most clear and expressed words of abrogation, and the consent of both nations before it can be considered as abrogated, cancelled or annulled. We feel sure that the Court would welcome the statements of distinguished jurists on this question, and we, therefore, take the liberty of quoting from Honorable Shelby M. Cullom, a well-known United States jurist, and authority on International Law. He says:

> "It is true that the Supreme Court has held that an act of Congress may repeal a treaty, but such repeal would only be effective so far as our domestic law is concerned. The other nation would still have a right to consider us bound by our contract, and if the contract was broken on our part, it might lead to a declaration of war."—North American Review, Volume 180, No. 2, pages 335, 345.

Again, Mr. Bryce, the British Ambassador at Washington, in a communication to Mr. Knox, Secretary of State, on February 27th, 1913, stated in relation to the Act of Congress of August 24th, 1912, and the effect thereof upon the Hay-Pauncefote Treaty, as set out in Senate document No. 4741, 63rd Congress, 2nd Sess. 101:

> "His Majesty's Government conceive that International Law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that the nation which holds that its

> treaty rights have been so infringed or brought into question by a denial that they exist, must, before protesting and seeking a means of determining the point at issue, wait until some further action violating those same rights in a concrete instance has been taken, which, in the present instance would, according to your argument, seem to mean, until tolls have been actually levied upon British vessels owned by citizens of the United States have been exempted."

Mr. Wu, the Chinese Minister, wrote to Mr. John Hay, the Secretary of State, on January 25th, 1899, as set forth in the Foreign Relations of the United States documents for 1899 at page 195, as follows:

> "However much the courts may feel bound to follow the legislation of Congress, I apprehend you will not contend that adverse legislation or the judgment of a domestic tribunal can release a government from its solemn treaty obligations."

Again on this subject, the Marquis of Salisbury addressed a communication to Mr. Welsh, on November 7th, 1878, as set out in Foreign Relations of the United States, 1878, at page 323; as also did Mr. Chang Yen Hoon, Chinese Minister to Mr. Blaine, Secretary of State, July 8th, 1889, Foreign Relations for 1889, at pages 132 and 133; and also Mr. Caleb Cushing, Minister to Spain, wrote to Mr. Fish, Secretary of State, on January 13th, 1877, Foreign Relations for 1877, page 492, where it is stated that:

> "The right of the nation to free itself from the burdens of a compact must rest in each instance on a more solid basis than the declaration of the Constitution with respect to the supremacy of the laws as well as treaties of the United States."

And Mr. Fish, Secretary of State, sent despatch to the United States Minister in China, in 1869, wherein he said:

> "You will make clear to the government to which you are accredited the settled purpose of the President

to observe with fidelity all treaty obligations of the United States."

(Foreign Relations of the United States, 1870, at page 303.)

These quotations have been submitted to the Court only on the larger aspect of the question. Of course, we insist in this case that there has not been any intent demonstrated by an act of Congress to abrogate the treaty, but that it is Rule 86 (which violates the treaty) as at present administered with the same effect as an act of Congress.

The express provisions of the Jay Treaty must be looked at, and treaty provisions must be so construed as to best conform to accepted principles of international law, and not in derogation of them. See *Villas v. Maridia* (1911), 220 U. S. 345, at pages 358 to 395.

The treaty is an entire contract, all its articles and provisions are dependent on each other, and have the force of conditions. Each clause of a treaty has the force of a condition.

The violation of any one article of a treaty, is a violation of the whole treaty; for all the articles are dependent on each other, and one is to be deemed a condition of the other; and a violation of any single article overthrows the whole treaty. Kent's Commentaries on International Law, (Abdy Edition) 392; Foulke International Law, (Philadelphia, 1920), Vol. 1, 444.

It is a general principle of construction with respect to treaties that they shall be *liberally construed* so as to carry out the apparent intention of the parties, to secure equality and reciprocity between them. See Mr. Justice Field's re-

marks in *Geofroy v. Riggs*, 133 U. S. 258, at page 271, and *in re Ross*, 140 U. S. 453, at page 475.

The Supreme Court of the United States is reluctant to construe an act of Congress as in violation of an existing treaty, and further than this there can be imputed to Congress no disposition or readiness to disregard the terms of the international agreements of the United States. See:

Ex parte Webb, 225 663, at page 683;
U. S. v. Mrs. Gue Lim, 176 U. S. 459;
Chew Heong v. U. S., 112 U. S. 536, at page 539;
Lem Moon Sing v. U. S., 158 U. S., at page 538.

In re Chin A. On, 18 Fed. 506, 9 Sawy, 343, the Court said:

> "Before the courts will impute to Congress an intention to violate an important article of a treaty with a foreign power, that intention must be clearly and unequivocally manifested, and the language of the statute must admit of no other reasonable construction."

In this connection we call to the Court's attention the case *in re Hermann Thomas*, 12 Blatchford, Circuit Court Reports, page 370, referred to also in *Terlinden v. Ames*, 184 U. S. Rep. 270, (1902), where the Court said:

> "Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, *without the consent of the United States*."

It is also worthy of note that the preamble to the Covenant of the League of Nations gives it as one of the League's objects:

> "To achieve international peace and security by a scrupulous respect for all treaty obligations."

Even the Immigration Act itself contains numerous references to treaty obligations. For instance, Section 28

of the Act of 1924 (8 U. S. C. A. §224) subdivision "f," defines:

> **"The term 'immigration laws' includes this chapter and all laws, conventions and treaties of the United States relating to the immigration, exclusion or expulsion of aliens;"**

In the case of *Terlinden v. Ames*, 184 U. S. Rep. 270, decided in February, 1902, the late Chief Justice Fuller said:

> "But where sovereignty and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance."

In this case the decision *in re Hermann Thomas, (supra)*, is cited with approval, and the principles there laid down approved.

SCOPE OF ARTICLE 3, AND EXPLANATORY ARTICLE OF 1796.

It is respectfully submitted that Article 3 of the Jay Treaty of 1794 and the "Explanatory Article" of 1796 cover, include and embrace three outstanding, separate and distinct subjects of agreement and international contract. First, there is what is known as "*Amity*," or friendship, shown by giving British subjects and United States citizens the right freely to pass and repass, to come and go, cross and recross, to and fro, back and forth, as and when they please at all times, from one country to the other, freely without let or hindrance or interference by or from the officials of either country on either side of the line; then there is the right of *Navigation*, the right to go freely into the waters of each country as therein set forth.

And thirdly there is the right freely to carry on trade and commerce with each other.

In fact the very Title of the Treaty of 1794 is that of "Amity, Commerce and Navigation," three separate and distinct matters. "Amity and Friendship" is the ancient name for treaties providing simply for mutual intercourse and friendship. See Foulke, Inter. Law, (1920) Vol. 1, 425; and article in Vol. 18 Columbia Law Review, (1918) 426.

The plain intention and purpose, and the proper interpretation and legal effect of the said third Article of the 1794 Treaty and of the 1796 "Explanatory Article" is, to give amicable intercourse freely from, to and among the people of each country on both sides of the line or international boundary. It gives a general freedom of social business and friendly intercourse, and freedom of navigation, portage and passage for the people of both countries.

The subjects and citizens of each country are to be freely admitted into the other in order to cement friendship, and promote social and international intercourse, business, trade and commerce.

In further support of our contention that the Treaty of 1794 gives Respondents the rights which they claim thereunder, we wish to draw to the attention of the Court and cite the additional and further international agreement entered into in the year 1796, or two years after the Treaty of 1794 was concluded and signed, which agreement of 1796 is to be found in volume one (1), 1776 to 1909, pages 607 to 609, of the work entitled, "Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers," by Mr. William M. Malloy, of the Department of State, at Washington, D. C., U. S. A., and which is there entitled and set forth in the following language, terms, provisions and conditions:

"1796."

"EXPLANATORY ARTICLE TO THE THIRD ARTICLE OF NOVEMBER 19, 1794, RESPECTING THE LIBERTY TO PASS AND REPASS THE BORDERS AND TO CARRY ON TRADE AND COMMERCE.

"*Concluded May 4, 1796; Ratification advised by Senate May 9, 1796.*

"Whereas by the third article of the treaty of amity, commerce and navigation, concluded at London on the nineteenth day of November, one thousand seven hundred and ninety-four, between His Britannic Majesty and the United States of America, *it was agreed that it should at all times be free* to His Majesty's subjects and to the citizens of the United States, and also to the Indians dwelling on either side of the boundary line assigned by the treaty of peace to the United States, *freely to pass and repass*, by land or inland navigation, into the respective territories and countries of the two contracting parties, on the continent of America, (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other, subject to the provisions and limitations contained in the said article;

"AND WHEREAS by the eighth article of the treaty of peace and friendship concluded at Greenville on the third day of August, one thousand seven hundred and ninety-five, between the United States and the nations or tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimies, Miamis, Eel River, Weeas, Kickapoos, Piankashaws, and Kaskaskias, *it was stipulated that no person should be permitted to reside at any of the towns or the hunting camps of the said Indian tribes*, as a trader, who is not furnished with a license for that purpose under the authority of the United States; which latter stipulation has excited doubts, whether in its operation it may not interfere with the due execution of the third article of the treaty of amity, commerce and navigation; And it being the sincere desire of His Britannic Majesty and of the United States that this point should be so explained as to remove all doubts and promote mutual

satisfaction and friendship; And for this purpose His Britannic Majesty having named for his Commissioner, Phineas Bond, Esquire, His Majesty's consul-General for the Middle and Southern States of America, (and now His Majesty's Charge d'Affaires to the United States,) and the President of the United States having named for their Commissioner, Timothy Pickering, Esquire, Secretary of State of the United States, to whom, agreeably to the laws of the United States, he has intrusted this negotiation: They, the said Commissioners, having communicated to each other their full powers, have, in virtue of the same, and conformably to the spirit of the last article of the said treaty of amity, commerce and navigation, entered into this explanatory article, *and do by these presents explicitly agree and declare, that no stipulations in any treaty subsequently concluded by either of the contracting parties with any other State or nation, or with any Indian tribe, can be understood to derogate in any manner from the* RIGHTS *of* FREE INTERCOURSE AND COMMERCE, *secured by the aforesaid* THIRD ARTICLE *of the treaty of amity, commerce and navigation, to the subjects of his Majesty and to the citizens of the United States, and to the Indians dwelling on either side of the boundary line aforesaid; but that all the said persons shall remain at full liberty* FREELY TO PASS AND REPASS, by LAND OR INLAND NAVIGATION, INTO THE RESPECTIVE TERRITORIES AND COUNTRIES OF THE CONTRACTING PARTIES, *on either side of the said boundary line, and freely* to carry on trade and commerce with each other, according to the stipulations of the said third article of the treaty of amity, commerce and navigation.

"This explanatory article, when the same shall have been ratified by His Majesty and by the President of the United States, by and with the advice and consent of their Senate, and the respective ratifications mutually exchanged, shall be added to and made a part of the said treaty of amity, commerce and navigation, *and shall be permanently binding upon His Majesty and the United States.*

"IN WITNESS WHEREOF, We, the said Commissioners of His Majesty the King of Great Britain and the

United States of America, have signed this present explanatory article, and thereto affixed our seals.

"Done at Philadelphia this fourth day of May, in the year of our Lord one thousand seven hundred and ninety-six.

(SEAL) P. BOND.
(SEAL) TIMOTHY PICKERING."

We submit that the clear explanation and wording of the foregoing agreement settles, beyond all question, that the Respondents are entitled to freely pass and repass, come and go, at all times as and when they please, as we have before contended, across the international boundary line without any interference from government officials of either country.

It will be observed that the later international agreement of 1796 refers to the "rights of free intercourse," secured by the third article of the 1794 Jay Treaty. It again gives them the right to enter each country freely, on either side of the international boundary line, not only for the purpose of trade and commerce, but, as it says, for "free intercourse," and association of each of the peoples with each other.

The right to freely carry on trade and commerce, is another right which is also given to the people of each country, and in addition the right of free navigation is once more affirmed in this 1796 "Explanatory Article," as it is called.

It is further submitted that the reasons given in the early part of the foregoing new Agreement or "Explanatory Article" of 1796, as justification for its negotiation and signature by the United States and Great Britain, support the contentions of the Respondents herein beyond any further controversy, and it plainly states that it is entered

into to remove any doubt which may exist as to the rights of the people of each country to cross and recross the border. It is respectfully submitted that no further argument on this point is necessary as the matter is concluded in favor of the Respondents herein by virtue of the express language and terms of this 1796 international agreement or "Explanatory Article."

We would also specially draw the attention of the Court to the fact that the last paragraph of this 1796 Agreement between the United States and Great Britain makes the 1794 and this 1796 Treaty and Agreement, by express words, "permanently binding upon His Majesty and the United States."

What the Jay Treaty of 1794 and the "Explanatory Article" of 1796 mean, both to the citizens of the United States and of Canada.

The Jay Treaty is what may be called for the United States and Canada a sort of Charter of Rights for British subjects in Canada to enter the United States at all times freely, to pass into, repass out, as and when they please, to go from Canada into the United States, and from the United States into Canada, and for the citizens of the United States to go as and when they please into Canada. This going to and fro, crossing and recrossing, by the subjects and citizens of both countries, under clause three (3) of that treaty, *is at all times to be free*, and *freely, without hindrance, interference or obstruction by officials of either country, and is unlimited as to time and place of so passing and repassing at all times freely.*

It is intended to be, and is, a kind of freedom of mutual and national intercourse for the subjects and citizens of

both countries in order to become friendly, good mixers, enjoy fellowship, exchange ideas, to engage in business and become employed and to carry on trade and commerce, generally, and to work in all lines of business and endeavor, including that of navigation.

Instructions Prior to Negotiation of Treaty.

When Mr. John Jay was about to depart for Great Britain, in order to negotiate what afterwards became the 1794 treaty, he was given his instructions and a list of objects which he should try and accomplish and have placed in any treaty that might be arranged between Great Britain and the United States.

It will assist the Court to some extent, to have before it any essential clause from those instructions which might throw any light on the meaning of article three (3) of the Jay Treaty of 1794, and the 1796 agreement.

In a work entitled, "The Diplomacy of the United States" being an account of the Foreign relations of the country from the first treaty with France in 1778 to 1828, written by a Boston scholar of that day, Mr. Theodore Lyman, Jr., in two volumes, 2nd edition, (1828), in Volume One (1), at pages 192 to 193, are set out the instructions of the United States Secretary of State at that time to Mr. John Jay, for his guidance in attempting to negotiate the 1794 Jay Treaty with Great Britain.

In Clause One (1) of those instructions Mr. Jay is directed to endeavor to accomplish as one of his objects, the insertion in any such treaty of a stipulation to provide for,—

"RECIPROCITY IN NAVIGATION."

We submit for the consideration of this Court that Article number Three (3) of the concluded Jay Treaty of 1794, and the "Explanatory Article" of 1796, purports to carry out in some measure the instructions of Mr. Jay in this matter, as it applies to Canada under that article of the treaty, wherein by Article Three (3) it is expressly provided that:

> "*IT SHALL AT ALL TIMES BE FREE* to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the boundary line, &c., &c., * * * *FREELY* to pass and repass by * * * *inland navigation, and to navigate* all the * * * waters thereof."

This is again repeated, more clearly, in the 1796 "Explanatory" article referred to.

In Clause number Five (5) of his instructions, Mr. Jay is advised specifically that another of the objects to be attained by him should be that of having any treaty he might arrange provide for the:

> "EXEMPTION OF EMIGRANTS, AND PARTICULARLY OF MANUFACTURERS FROM RESTRAINT."

We might logically, and not without sound reason, contend that Article Three (3) of the concluded Jay Treaty of 1794, and the "Explanatory Article" of 1796, cover and provide for this direction in Clause Five (5) of Mr. Jay's instructions, when they give the passing and repassing right and privilege as therein set out. But, as neither of the parties to the Treaty had any desire to term or describe each others' border-neighbors in North America as "emigrants," it was considered better and wiser by both not to offend the

other's national pride or sensibilities and so it was arranged to use the less offensive and better language to accomplish the same purpose as it is found in Article Three (3). They thus permitted each country's subjects and citizens wide latitude of egress and ingress, passing and repassing from, into and out of each others' country in North America, and of coming and going, when and as they pleased, at all times.

It gives the subjects of Great Britain and the United States, on either side of the Boundary line the right *freely to pass and repass* from one country into the other, and declares that "*shall at all times be free*" for such peoples to go from one country to the other *freely*, not for trade and commerce only, *but freely at all times* without restraint.

These matters, it will be observed, are totally separate and distinct, and as we contend they all are separate and distinct in Article Three (3) of Treaty. The passing and repassing does not depend upon navigation, nor does it depend upon carrying on trade and commerce, nor does one depend upon the other, nor are they conditional upon each being made contingent upon the other for its operation. It might as well be contended that the reciprocal navigation part of Article Three is dependent upon the passing and repassing part, or *vice versa*, which would be absurd.

As further showing the relation of the instructions of Mr. John Jay to the completed Treaty of 1794, we draw the attention of the Court to Clause Ten (10) of the instructions, and compare it with Article 9 of the Jay Treaty, one of the permanent articles, which has been passed upon by the Courts also.

Clause Ten (10) of the instructions of Mr. Jay is set out on page 193 of the above book by Mr. Lyman, and it directs to Mr. Jay that:

> "The intercourse with England makes it necessary that the disabilities, arising from alienage in cases of inheritance, should be put upon a liberal footing, or rather abolished."

To the same effect is the history of this Clause Ten (10) as found in a volume entitled, "Treaties and Conventions between the United States and other Powers," (1776 to 1887), published by the Department of State at Washington in January, 1889, under the direction of Mr. John H. Haswell, where it is stated at pages 1237 and 1238 that:

> "the instructions to Mr. John Jay, in 1794, left it to the discretion of that Minister, whether the subject of a commercial treaty may not be broken to the British Ministry, and should that be done, the general objects which it should effect were enumerated; among those it is said;"

here follows Clause Ten (10) above set out.

At page 1238 of this same volume it is then authoritatively stated that:

> "The 9th Article of the Treaty of 1794 with Great Britain provides that British subjects then holding lands in the territories of the United States may continue to hold them, &c., &c., * * * and that neither they, nor their heirs or assigns, shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens."

We submit that the foregoing statements clearly show another of the Jay Treaty articles conforming in essentials in some measure to the instructions of Mr. John Jay, and important evidence as to the meaning of the Treaty clauses.

A reference to the 1796 "Explanatory Article" is made on page 203 of the above mentioned book by Mr. Theodore Lyman, which merely states the fact that this additional article was added to the 1794 Treaty in the year 1796.

The Supplementary Agreement of 1796 is also Permanent.

We have referred in a previous part of this brief to the *New Haven* case, which embodies a judicial declaration, by the Supreme Court of the United States, of the principle that treaties stipulating for permanent rights, or purporting to be perpetual, or contemplating a state of war, do not cease on the occurrence of war, but are at most suspended while it lasts, and revive on the restoration of peace in default of contrary agreement, and the leading authorities agree with this conclusion.

The question whether a treaty or stipulation was intended to set up a "permanent state of things" must be judged in the light of the terms or stipulation, and the circumstances of each particular case.

In the present instance, however, of the Jay Treaty of 1794, and the "Explanatory Article" of 1796, there can be no reasonable basis for dispute because, by its express terms, *a permanently binding treaty is on record* in this case, *expressly declared to be "permanently binding upon His Majesty and the United States."*

As bearing directly on this aspect of the case for the Respondents herein we wish to cite what is said by Professor George G. Wilson of Harvard University in his book on International Law, (1927) 2nd edition, 430, where he states therein, in referring to the Respondents herein, makes the following statement:

> "Some treaties may revive *ipso facto* on the conclusion of a treaty of peace. The general principle was stated in 1823 by the United States Supreme Court":
>
> > "We think, therefore, that treaties stipulating for *permanent rights* and general arrangements and *professing to aim at perpetuity*, and to deal with the case of war as well as of peace, *do not*

> *cease on the occurrence of war, but are, at most, only suspended while it lasts;* and unless they are waived by the parties, or new and repugnant stipulations are made, *they revive in their operation at the return of peace,"* citing *Society for Propagation of Gospel v. New Haven,* (1823), 8 Wheaton 464, 5 L. Ed. 662.

Crandall on Treaties, Washington, 1904 Ed., page 242, says that treaties recognizing permanent obligations or aiming at perpetuity are at most only suspended during war, and cites Moore in Columbia Law Review, Vol. 1, page 213, *re* the 1834 treaty, suspended during 1898 Spanish War and continued afterwards. At page 241 also cites the *New Haven* and *Sutton v. Sutton* cases. See Crandall's 2nd Edition, 1916, to same effect.

Chancellor Kent, in his Commentaries on International Law (Abdys Edition), page 394 says:

> "In the case of the *Society &c. v. New Haven,* the Supreme Court of the United States would not admit the doctrine that treaties became extinguished *ipso facto* by war, unless revived by an express or implied renewal on the return of peace. Such a doctrine is not universally true. Where treaties contemplate a permanent arrangement of national rights, or where, by their terms, they are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. They revive at peace, unless waived, or new and repugnant stipulations be made, and see *Sutton v. Sutton,* 1 Russ. and Mylne, 663, where the same principle is maintained in an English court of chancery."

It will be observed that the *New Haven* case, and that of *Sutton v. Sutton,* are cited and set out as leading cases by all the outstanding and recognized authorities in the field of international law, such as Professor James Brown

Scott, of the Carnegie Institute, in his book of leading cases on international law, 1st edition (1902), pages 427, 428; and in his 2nd edition (1922), pages 93, 468; by Professor Charles C. Hyde, of Columbia University, in his work on "International law as applied and interpreted by the United States," (1922), 2 Volumes; by Professor George C. Wilson of Harvard University in his books on international law, 2nd edition (1927), by Professor Charles G. Fenwick of Bryn Mawr College, in his principles of International Law, (1924), 444, 468; and in Evans Leading cases on International Law, Boston, (1917), 235, 240, (1922), 398; in addition to their authority as settled by the United States Supreme Court, and by the Courts in England.

Professor Pitt-Cobbett in his leading cases on International Law, 4th Ed. (1924), Vol. 2, page 44, says:

> "The New Haven case embodies a judicial declaration of the principle that treaties stipulating for permanent rights, or purporting to be perpetual, or contemplating a state of war, do not cease on the occurrence of war, but are at most suspended while it lasts, and revive on the restoration of peace in default of contrary agreement, and with this conclusion both the doctrine of the English Courts as shown by *Sutton v. Sutton*, 1 R. & M. 363, and the present international practice may be said to agree."
>
> "The question whether a treaty or stipulation was intended to set up a 'permanent state of things' must be judged in the light of the terms of the treaty or stipulation, and the circumstances of each particular case."

Professor Norman Bentwich, in his leading cases on International Law, (1913), at page 150, referring to the *New Haven* case, and *Sutton v. Sutton*, says:

> "These two decisions, one of an English and the other of an American tribunal, show that war does not put an end to the effect of all treaties between the belligerent countries, though it may suspend their operation during the hostilities."

The Treaty—Convention of 1815.

A short reference to the above Convention will help to further explain the Jay Treaty of 1794, and the additional "Explanatory Article" of 1796.

On July 3rd, 1815, a new Convention, or Treaty Agreement, to regulate commerce and navigation between Great Britain and the United States was concluded and signed, and ratifications were exchanged at Washington on December 22nd, 1815.

This agreement was to last for four (4) years, but it was extended for ten (10) years by the Treaty of October 20th, 1818, and further indefinitely extended by a Convention of August 6th, 1827, subject to twelve months' notice of abrogation.

Regarding the present position of this Treaty-Convention, showing it to be still in force and effect, Senator Elihu Root, formerly United States Secretary of State, in his argument before the Permanent Court at The Hague in 1910, on the Fisheries Arbitration, referred to this 1815 Convention, incidentally, as follows:

> "The kind of right which was granted in the treaty of 1815, that treaty which was continued by the treaty of 1818, and which, I may observe, was again continued in 1827, and is the treaty under which we live today, to travel and reside."

The above Convention of 1815 will be found on pages 624 to 627 of Malloy's Treaties, Conventions, &c., Vol. 1, (1909), and also in a work by the late Professor Freeman Snow, of Harvard University, entitled: "Treaties and Topics in American Diplomacy," Boston, (1894), at page 76.

It will be remembered that all the articles of the Jay Treaty of 1794, except the first ten, expired by the time limitation stated in the treaty, and by the year 1807 all the articles, from number eleven inclusive to twenty-seven (27), had lapsed in accordance with the provision of article numbered 28 regarding this matter

This Treaty-Convention of 1815 gives the people and inhabitants of His Majesty's territories in Europe full liberty and freedom to come, with their ships and cargoes, to all the United States territories in America, and permits them to reside there indefinitely, and to build houses for themselves, a similar privilege was given United States citizens.

By this Convention a number of the important articles of the Jay Treaty of 1794, which had expired under the time limitation of Section 28 of that Treaty, were revived and their essential parts again brought into force.

There was no necessity, however, to deal with the first ten (10) articles of the Jay Treaty, because they had already been made permanent and, so far as Canada was concerned, article three (3) of the Jay Treaty gave that country what was now being given to Great Britain and the United States under this new 1815 Convention, and which was previously enjoyed under the old expired clauses of the 1794 Treaty. For instance, Article one (1), and (2), of the 1815 new treaty-convention can be compared with, and are similar to, clauses (14) and (15) of the 1794 treaty.

Article (3) is similar to clause (13) of the 1794 treaty, article (4), referring to Consuls, compares with clause 16 of the 1794 treaty. But the most important article of this 1815 Convention for our argument is the last clause of ar-

ticle two (2) which, we contend, also preserves all our rights under article three (3) of the Jay Treaty of 1794, and the "Explanatory Article of 1796." The last clause of article number two (2), of the 1815 Convention, reads as follows:

> "*The intercourse between the United States and His Britannic Majesty's possessions* in the West Indies, and *on the Continent of North America, shall not be affected by any of the provisions of this article, but each party shall remain in the complete possession of its rights, with respect to such an intercourse.*"

INTERPRETATION OF TREATY OF 1794 AND "EXPLANATORY ARTICLE" OF 1796.

The principles of interpretation which should be applied specifically to the Jay Treaty of 1794 were enunciated in clear and unambiguous language by the Supreme Court of the United States, through Mr. Justice Story, in the case of *Shanks v. Dupont*, 3 Peters, 242, and 250; 8 Curtis' Decisions of Supreme Court of the United States, 395 and 400, (1830), where it is said:

> "*It seems to us, then, that all British born subjects ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words, of the Treaty of 1794.*"
>
> "*If the treaty admits of two interpretations, and one is limited and the other liberal, one which will further and the other exclude private rights, why should not the most liberal exposition be adopted*"?

In addition to the above we submit that the following cases should be applied, as setting forth the proper rules to be followed, in arriving at the true meaning and interpretation of the Treaty of 1794 and of 1796:

In the case of *Tucker v. Alexandroff* (1902), 183 U. S. 424, 22 S. Ct. 195, 46 L. Ed. 264, the broad basis of interpretation was stated by the Supreme Court of the United States as follows:

Mr. Justice Brown:

"As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is, not only to avoid war and secure a lasting and perpetual peace, *but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit* which is calculated to make for the existence of a perpetual amity so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence."

Mr. Justice Brown, at page 437, also said:

"The treaty should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose."

In the cases of *Sullivan v. Kidd* (1921), 254 U. S. 433, 41 S. Ct. 158, 65, L. Ed. 344; and *Missouri v. Holland* (1920), 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984; the Supreme Court said:

"Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties; that all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole."

It is a well-settled rule, laid down by the Supreme Court of the United States, in the case of *Hauenstein v. Lynham* (1879), 100 U. S. Rep. 487; 25 L. Ed. 628, that:

"*Where a treaty admits of two constructions*, one restricted as to the rights that may be claimed under it, and the other *liberal, the latter is to be preferred.*"

And see the case of *Adams v. Akerlund,* 168 Illinois 632, 638; 48 N. E. 454 (1897), where *Hauenstein v. Lynham, supra,* and other leading cases are collected and cited to the same effect on the interpretation of treaties.

Professor Chas. C. Hyde, formerly counsellor of the Department of State at Washington, and now of Columbia University, in his work on "International Law, as interpreted and applied by the United States" (1922), Vol. 2, page 63, says:

> "The ascertainment of the sense in which terms have been employed in a treaty involves a search for sources of interpretation. These may be found in what is extrinsic to the agreement."

The use of whatever sheds light on the question involved is not restricted by prohibitive rules such as those in which the common law abounds. As Professor Westlake has well said: "The important point is to get at the real intention of the parties, and that inquiry is not to be shackled by any rule of interpretation which may rest in a particularly national jurisprudence, but is not generally accepted in the civilized world."

And on page 65 Professor Hyde sets out the submissions of counsel for both Great Britain and the United States, in the proceedings before the Alaska Boundary tribunal arbitration, as to the proper rules of construction and interpretation of that treaty dispute as follows:

For the United States it was said that: "the United States asserts that the intention of the parties to the treaty is vital to its true interpretation; that such intention between the nations is the very essence of the agreement; and that any material variance from the intention must give place to an interpretation in accordance with it."

For Great Britain it was said that: "the function of the tribunal is to interpret the Articles of the Convention by ascertaining the intention and meaning thereof and not to recast it. Any consideration showing that the words of the treaty must have been intended to bear a particular meaning, being a meaning which they are in themselves capable of bearing, may, of course, be legitimately presented."

In the case of *Marryatt v. Wilson*, 1. Bosanquet & Puller Rep. 435, 436, cited by Professor Hyde, Chief Justice Eyre said:

> "We are to construe this treaty as we would construe any other instrument, public or private. We are to collect from the nature of the subject, from the words and from the context, the true intent and meaning of the contracting parties, whether they are A and B, or happen to be two independent States."

And Mr. Alexander Porter Morse, the United States Arbitrator in the *Van Bokkelen* case, under a treaty regarding the United States and Haiti, of the year 1888, in giving his opinion said, that the case of:

> "*Marryatt v. Wilson* is strong authority for the proposition that *the municipal tribunals of the country may not nullify the purpose and effect of treaty language by imposing upon it a cramped, narrow, and forced construction.*" Cited by Hyde, Vol. 2, page 67.

The above cases of *Marryatt v. Wilson*, and *Van Bokkelen* are also cited on pages 451 and 452 of Scott's leading cases on International Law, 1922 edition.

The Supreme Court of the United States has laid down certain principles of Interpretation in connection with Treaties between Nations.

In the case of *Geofroy v. Riggs*, in 1890, 133 U. S. 258, 271, 10 S. Ct. 295, 33 L. Ed. 642, that Court said:

Mr. Justice Field:

> "It is a general principle of construction with respect *to treaties that they shall be liberally construed*, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. *And it has been held by this court that, where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is preferred.*"

And see the language of the same judge, Mr. Justice Field, in the case of *in re Ross & McIntyre*, 140 U. S. Rep. 453, 475, where the previous case of Geofrey v. Riggs is referred to as authority on treaties.

The British Appellate Court in England, known as the Judicial Committee of the Privy Council, referring to the interpretation of the Sixth Hague Convention, 1907, Status of Enemy Merchant Vessels at the Outbreak of Hostilities, said, in the case of *The Blonde* and other Ships (1922), 1 App. Cases, P. C. 213:

> "In construing such an international instrument as that now in question, it is profitable to bear in mind from the outset sundry considerations, which are not the less important for being doubtless somewhat obvious. It results from deliberations among the representatives of many powers, in which none can expect without some concession to insist upon his country's interests, its language, or its law. It is expressed in what is by tradition the common language of international intercourse, but it would be unreasonable in

the circumstances to expect of it either nicety of scholarship or exactitude of literary idiom. Neither the municipal law nor the technical terms of the negotiating countries can be expected to find a place in its provisions. Where interests conflict, much must be allowed to the effects of compromise; where the principles, by which future action is to be guided, are laid down broadly, leaving to the powers concerned the actual measures to be taken in execution of those principles, it is unreasonable to expect a greater precision than the circumstances admit of, or to reject as incomplete provisions which are expressed without much detail and sometimes only in outline.

"On the other hand, it is specially necessary to discover and to give effect to all the beneficient intentions which such instruments embody and which their general tenor indicates. *It is impossible to suppose, whatever the imperfections of their phrasing, that the framers of such instruments should have intended any power to escape its obligations by a quibbling interpretation, by a merely pedantic adherence to particular words, or by emphasizing the absence of express words, where the sense to be implied from the purport of the convention is reasonably plain.* Least of all can it be supposed that His Majesty's Government could have become parties to such an instrument *in any narrow sense*, such as would reserve for them *future loopholes of escape from its general scope.*"

In the case of *United States v. Ferris, et al.*, and *Lane v. Stone*, 19 Fed. (2nd) (1927), 925, Judge Bourquin, in giving judgment, said that:

> "A decent respect for the opinion of mankind, national honor, harmonious relations between nations, and avoidance of war, require that the contracts and law represented by Treaties shall be scrupulously observed, held inviolate, and in good faith precisely performed—require that Treaties shall not be reduced to mere 'scraps of paper'."

THE JAY TREATY OF 1794 WAS RECOGNIZED AS BINDING AND HELD TO BE IN FORCE AND DECISIVE OF THE QUESTIONS RAISED IN THE FOLLOWING CASES, AT THE TIMES AND DATES STATED, AFTER 1794 AND 1812.

Fitzsimmons v. Newport Ins. Co., 4 Cranch, 185; 2 Curtis U. S. 65, 69, *(1808)*:

"Condemnation of a neutral vessel for the intent to enter a blockaded port—considered in 1808 under provisions of the Treaty of 1794 by Chief Justice Marshall."

Fairfax v. Hunter, 7 Cranch, 603, 627; 2 Curtis U. S. 684, 691, 692, *(1813)*:

"Ejectment action involving those claiming rights under the Treaty of 1794."

Judge Story:

"For we are well satisfied that the treaty of 1794 completely protects and confirms the title of Denny Fairfax."

Jackson v. Clark, 3 Wheaton, 1; 4 Curtis Decisions, U. S. 153, *(1818)*:

"C. J. Marshall held that under Art. 9 of the Treaty of 1794 between the United States and Great Britain, British subjects, etc., may continue to hold land, etc. Defendant continued to be a British subject and he is entitled to hold and devise the land in question under that Treaty."

Craig v. Bradford, 3 Wheaton, 594; 4 Curtis U. S. 305, 308, *(1818)*:

"Judge Washington held that a defeasible title, etc., is completely protected and confirmed by the 9th Article of the Treaty of 1794, between the United States and Great Britain."

(Confirms *Fairfax v. Hunter* case.)

Orr v. Hodgson, 4 Wheaton, 453, 464; 4 Curtis U. S. 442, 443, 445, *(1819)*:

"Discusses the question—Who are heirs—under the 9th Article of the Treaty of 1794."

Story, J., referring to the Treaty of 1794, said:

"By the express terms of the treaty, it might lawfully pass to her heirs."

Shanks v. Dupont, 3 Peters, 242, 250; 8 Curtis Decisions of Supreme Court of U. S., 395, 400, *(1830)*:

"A woman, a citizen of Charleston, S. C., who married a British officer with whom she went to England in 1782 and remained there till her death in 1801—is a British subject within the purview of the 9th Article of the Treaty of 1794 with Great Britain."

Story, J.:

"The question arises whether she and her heirs are not within the purview of the 9th Article of the Treaty with Great Britain of 1794. It appears to us that they plainly are."

"Now, Mrs. Shanks was at the time a British subject, and she then held the lands in controversy; she is therefore, within the words of the Treaty. Why ought she not also to be held within the spirit and intent?"

"*If the treaty admits of two interpretations, and one is limited and the other liberal, one which will further and the other exclude private rights, why should not the most liberal exposition be adopted?*"

"*It seems to us, then, that all British born subjects ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words, of the Treaty of 1794.*"

Blight's Lessee v. Rochester, 7 Wheat, 535; 5 Curtis Decisions of Supreme Court of U. S., 316, 319, *(1822)*:

"The treaties of 1783 and 1794 only provide for titles existing at the time those treaties were made, and not to titles subsequently acquired, etc."

The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven and Wm. Wheeler, 8 Wheaton, 464, *(1823)*:

"Under the Treaty of 1783, the property of such corporation as plaintiff is protected the same as that of an individual and title thus protected is confirmed under the Treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceedings, for the defect of alienage. Strong judgment that the treaty of 1794 still is in force."

In the following case, the 2nd and 9th Articles of the Jay Treaty, 1794, were discussed and declared to be binding. ***Forsyth v. Reynolds,*** 15 Howard, 358, 20 Curtis Decisions U. S., 561, *(1853)*:

"Lands granted by the Act of March 3rd, 1807, in fulfilment of the 2nd Article of the Treaty of 1794, between the United States and Great Britain, were not donations, and did not disqualify a settler from receiving a donation under the Act of May 15th, 1820, and of March 3rd, 1823."

Harden v. Fisher, 1 Wheaton 300, 302; 5 Curtis Decisions of Supreme Court of U. S., 560, 561, *(1816)*:

(C. J. Marshall): "What British subjects holding lands in the United States must show under the Treaty of 1794, Article nine, so as not to be considered as aliens in regard to lands held by them in the United States."

Hughes v. Edwards, 9 Wheaton, 489, 496; 6 Curtis Decisions of Supreme Court of U. S., 146, 150, *(1824)*:

The title of alien mortgagee is protected by the treaty of 1794, etc.

*(Approves **Harden v. Fisher,** and **Orr v. Hodgson.**)*

Judge Washington said:

"This objection would not, we think, avail the appellants, since the remedies, as well as the rights of

these aliens, are completely protected by the treaty of 1794."

Denn ex. Dem. Fisher v. Harden, 1 Paine Circuit Court 55, Rep. of United States *(1812)*:

Reversed on appeal in 1 Wheaton Rep. 300; 5 Curtis Decisions Supreme Court 560 *(1816)*—where court found that plaintiff held title to the land in question at date of treaty of 1794.

(See same case above under *Harden v. Fisher.)*

Jackson ex Dem. v. Augustus Porter, 1 Paine Circuit Court Reports of United States, 457, *(1825)*;

This case discusses boundaries of a post under *Article 2* of the Jay Treaty of 1794.

The Court said:

"Articles 2 and 9 of the 1794 Treaty were meant to protect legal and equitable interests in land and not trespassers and intruders without rights."

Judge Thompson, at pages 481, 482, 483, referring to the Jay Treaty of 1794, said:

"The 2nd and 9th Articles have been referred to. The Treaty applies to the title whatever it is, and gives it the same legal validity as if the parties were citizens."

The Society for the Propagation of the Gospel, etc., v. Wheeler, et al., 2 Gallison Circuit Court Reports of United States, 105, Fall Circuit Court of United States, New Hampshire, Oct. Term, *(1814)*, at Exeter:

Part of this decision falls under the Jay Treaty of 1794. Speaking of Article 9, Judge Story at page 135 says:

"This article has never been annulled, and therefore remains in full force. It deserves and ought to receive a liberal construction."

See Judge Story at page 127, lines 6 on, where he refers to Article 9 of Treaty as overruling defendant's argument that the Gospel Corp. can not sue on account of alienage.

In the case of *Martin v. Hunter's Lessee*, 1 Wheaton, 304, 360, 368, 370; 3 Curtis Decisions of Supreme Court of U. S., 584, 588, 589 *(1816)*, Judges Story and Johnson refer to the Treaty of 1794 as being then in existence and of binding force, Mr. Justice Johnson holding, at page 370, that:

"THE TREATY OF 1794 HAD BECOME THE SUPREME LAW OF THE LAND * * * THE MAJORITY OF THE COURT DETERMINED THAT, AS A PUBLIC LAW THE TREATY WAS A PART OF THE LAW OF EVERY CASE DEPENDING IN THIS COURT."

The Opinion of the District Court.

Justice Hazel, in his opinion, at folio 113 of the record herein, in referring to the Respondents herein, makes the following statement:

"That they are 'immigrants' is plainly apparent from the definition which Congress gives the term. Title 8, Chap. 6, sec. 203, U. S. C. A., and the exception (sub. 2) does not mean that a daily workman or employee of the alien class, retaining his residence in foreign contiguous territory, is permitted to pursue an ordinary vocation for a wage, or that he comes here temporarily for business, trade or commerce."

The conclusion that the Respondents are "immigrants" within the purview of the Act of Congress can only be arrived at by assuming the correctness of the Court's construction of the words "temporarily for business", which the Court defines as follows:

> "To come for business, within the meaning of the statute, indicates a temporary purpose to engage in a business transaction, as that of a merchant, or one engaging in traffic or trade. Congress did not use the word 'business' in its broadest sense, or in a sense including daily labor or an occupation, trade, or calling for hire. It had in mind a restriction of the broad term 'business', as is clearly manifest from the general scope and purpose of the act."

In attacking this definition we refer now to the definition of the word "business" in its *narrower sense* as signifying "*a calling for the purpose of livelihood or profit*", as cited previously in the brief and defined in *Estabrook v. Hebrew Ladies Orphan Asylum*, 82 Atl. 561 at page 563, 85 Conn. 289, 41 L. R. A. (N. S.) 615.

In construing a statute, the practical interpretation thereof previously given by the Department effected is in itself one of the guides of construction. This medium does not need the support of authorities before this Court.

Until December 1st, 1927, the interpretation of the word "business" as used in Act of Congress (8 U. S. C. A. §102) *was adopted by the Department of Labor itself.*

This interpretation up to now has conceded to British subjects the border crossing-commuting privilege pursuant to the words "temporarily for business", *as otherwise there would have been no necessity for the promulgation of General Order 86.* If the Court below correctly construed

the section, the promulgation of General Order 86 was unnecessary and superfluous because it was the law already. Yet, in practical effect, it is keeping hundreds of British subjects in Canada *who have previously crossed and recrossed at will.*

The Court inadvertently assumed also in the last line of folio 115 and in folio 116 of the record herein, that the Respondent Cook alone is a subject of Great Britain, by implying that the Respondent Dancion is not. As the record will disclose, both are subjects of Great Britain, and are carefully protected by the terms of the Jay Treaty of 1794, if the Treaty has not been abrogated.

We take exception to the reasoning of the Court in folios 117 to 119 of the record herein, because it seems to counsel that the Court interprets the provisions of the Treaty not as they stand, but in connection with the rule, the very validity of which we are attacking. He states:

> "Though the Jay Treaty, it is strongly urged, protects Miss Cook from exclusion, I nevertheless, assuming Art. 3 to be still in force, think that it cannot be considered as including British subjects not born in Canada, *whose status is that of immigrants* and who seek to cross the border solely to labor here or to seek employment at trades or avocations without establishing a domiciliary status, as provided by the Immigration Act of 1924. The relators were not passing from one country to another to carry on trade or commerce, as those terms are ordinarily understood, but, as pointed out, simply to work for a daily wage, crossing back to their homes in Canada in the evening and returning in the morning, and such free passing and repassing was not contemplated by the Jay Treaty or by Congress in the enactment of the Immigration Act."

By the very words, "whose status is that of immigrants", the Court is assuming an interpretation of the

Jay Treaty which negatives the conclusion that British subjects may pass to and fro without acquiring the status of immigrants, and, on the contrary, assumes that General Order 86 is valid in classifying them as immigrants, and assumes that any British subject desiring to cross the border temporarily for business is *properly* classified as an immigrant, which while consistent with his conclusion, folios 113-114 of the record herein, we respectfully urge, is not the law.

We further submit that the District Court erred in stating that the Respondents were not passing from one country to the other to carry on trade and commerce, as the terms are "ordinarily understood". We claim the right of the Respondents in this case is based on the right to enter the country "temporarily for business" as non-immigrants, as provided in the immigration act and upon their right to "cross and recross" the border as British subjects, in accordance with the provisions of Article 3 of the Jay Treaty. The right under the Treaty we contend is to "cross and recross" without restriction. To carry on trade and commerce is an additional right granted these British subjects.

Again the District Court states, in folio 119 of the record:

> "I conclude that order No. 86 is a valid regulation and requires that the relators, before entering, must have an immigration visa, and that they come from contiguous territory to seek employment or to work for a wage, does not change their classification as immigrants."

We respectfully submit that because they do come to seek employment or to work for a wage does according to the District Court's opinion change their status from that

of non-immigrants to immigrants, and makes them immigrants *merely because they seek work*. This we contend is erroneous.

We respectfully submit that the Petition should therefore be denied.

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Amicus Curiae, on the brief for the Respondents.

JULY, 1928.

Charles D. Council
of Counsel for the Respondents

OPPOSITION

BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 198.

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF IMMIGRATION, and CHARLES DREHER, INSPECTOR IN CHARGE, UNITED STATES IMMIGRATION SERVICE. *Petitioners,*

v.

UNITED STATES OF AMERICA, on the Petition of PRESTON M. ALBRO, an Attorney, for MARY COOK and ANTONIO DANELON.

Brief in Opposition to Petition for Rehearing of Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

So far as the legal questions involved in this application and in the original petition for a writ of certiorari are concerned, the respondents are content to rest upon the unanimous opinion herein of the Circuit Court of Ap-

peals and upon the authorities submitted to this Court in the brief in opposition to the petition for a writ of certiorari.

The petition herein, however, contains certain statements, which, in view of the facts conceded in the brief heretofore filed by the petitioners, we respectfully submit, should be called to the attention of the Court.

The original brief, prepared by the Solicitor General, contained this statement, in referring to the Immigration Act of 1924, from which we quote from page 9 of their brief:

> "For nearly three years after that Act was passed, aliens residing in Canada were allowed to cross daily to work, on the theory that they were not immigrants."

and again at the bottom of page 11:

> "It must be admitted that the decision below has much to support it, and the fact that the Department of Labor so construed the Act of 1924 from its passage until April 1, 1927, is not to be overlooked."

Now, on page 4 of the petition herein, it is stated:

> "As a consequence of the decision as it now stands it is respectfully pointed out that not only British subjects of the white and black races, but also of the Oriental races, can enter Canada and immediately gain admission to the United States for practically an indefinite period without regard to the immigration laws which forbid the admission as immigrants of persons ineligible for citizenship. In fact, it follows that persons of any nationality must be admitted to the United States under this decision without regard to the immigration laws so soon as they become lawfully domiciled within Canada and thereby become British subjects."

The statement, which we have just quoted, it seems to us, fails to take into consideration three important

facts, the first being that, under the recent decision of this Court in *Nagle, Commissioner of Immigration v. Loi Hoa, decided on January 3rd, 1928, Supreme Court Reporter Advance Sheets, February 1st, 1928, page 160,* the Court seems to definitely hold that within the meaning of the Immigration Act (particularly referring to the Chinese Exclusion Act), the word, "subject," is given a narrower construction that that applied in the Pizzarro case, 2 Wheaton, 227, and refers to persons owing permanent allegiance and not to persons merely domiciled within a country but still owing permanent allegiance to another sovereignty; second, it fails to call to the Court's attention the fact that Canada itself has immigration laws which prevent the entry of Chinese and even races themselves subject to Great Britain; third, the decision of the Circuit Court of Appeals in no way prevents the promulgation by the Secretary of Labor and the Commissioner General of Immigration of any rule consistent with the Immigration Act of 1924 and the Treaties of the United States which will define, limit or give a reasonable construction to that which constitutes a "temporary visitor."

The authorities submitted in the original brief of the respondent seem to us to hold beyond any possible doubt that Article III of the Jay Treaty of 1794, declared by supplemental treaty of 1796 to be permanent, is in force. The petitioner seeks to cast a doubt upon this decision by referring to the provisions of the Treaty of Ghent of 1814, and, in reply to this, we would simply call the Court's attention again to the holding in *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven, 8 Wheaton, 464, 5 Law Editions U. S. Reports 662.* In this case, the United States Supreme Court in the year 1823 had occasion to consider the effect of the War of 1812 on

the Treaty of Peace of 1783 and the Jay Treaty of 1794, and also considered the effect of the Treaty of Ghent of 1814 and this Court decided that the Jay Treaty of 1794 was not affected by any of the other treaties because it was a stipulation of permanent rights and was only suspended during the War of 1812.

Further, in the year 1842, the Webster-Ashburton Treaty was entered into between Great Britain and the United States, and, in this Treaty, the Jay Treaty of 1794, the first ten clauses of which are in express terms declared to be permanent, is incorporated and made a part of the 1842 Treaty for the purpose of finally determining and settling the boundary between territory of Great Britain and the United States in North America under the Treaty of Peace of 1783 and the Jay Treaty of 1794 and under the Treaty of Ghent of 1814. (See Malloy, Vol. 1, page 620.)

It is further undisputed that the United States and Great Britain have acquiesced in the crossing and recrossing privileges under the Jay Treaty and they have been acted upon and in operation with full knowledge of both nations, without objection, ever since the year 1794 down to and including the passage of General Order No. 86 on April 1st, 1927.

The Solicitor General, referring to the Jay Treaty of 1794, states at the bottom of page 2, and at the beginning of page 3 of the petition for rehearing, that:

> "In view of the fact that mutual rights were granted by Article III to British subjects and American citizens, as well as to Indians dwelling on either side of the border, it reasonably might appear that any question regarding whether the treaty is in force and effect is a political and not a judicial one. * * ***

and again on page 11 of the petition for rehearing, in referring to the same matter as above mentioned, he stated in the second paragraph on this page:

> "Furthermore, if the Circuit Court of Appeals is correct in holding that these aliens are admissible under the statutory exception relating to aliens coming to the United States temporarily for business, the court need not have decided whether the Treaty of 1794 was in force and effect and should have left that matter to the decision of the political branch of the Government."

We respectfully submit that the political branch of the Government has already passed upon this question and decided that the Jay Treaty is in full force and effect. Under date of March 17th, 1919, the Hon. William Phillips, then Acting Secretary of State of the United States, transmitted to the Senate a letter in response to a resolution passed by the Senate directing the Secretary of State to furnish the Senate with complete information concerning, "The countries with which the United States has Treaties which prevent us from giving preference to Americans or American ships in the carrying of imports or exports, and what is necessary to be done to abrogate such Treaties, and what, if any, steps our Government has taken to secure the abrogation of the same." From this letter we quote:

> "The Acting Secretary of State transmits to the Senate herewith a memorandum prepared in the Department of State in response to the resolution quoted above. It is hoped that this memorandum will contain the information desired by the Senate."

The Jay Treaty of 1794 is then copied in full and appears in Volume 14, pages 5, 18 and 19 of the Senate Documents of the 66th Congress of the United States, first session 1919. The then Acting Secretary of State then states with regard to the Jay Treaty of 1794 and Article III thereof:

> "*The Treaty from which the above quoted Article*

is taken contains no provision for abrogation; hence, agreement by the parties thereto would seem to be necessary effectively to accomplish its abrogation as an international agreement. No action has been taken by either government looking to abrogation.''

The resolution above referred to, and the letter and other documents quoted from the Acting Secretary of State, seem to show that the political department of the Government has already determined that the Jay Treaty of 1794 is still in full force and effect.

We further respectfully submit that the petition for a rehearing herein should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 198.

ARTHUR J. KARNUTH, United States Director of Immigration, and CHARLES DREHER, Inspector in Charge United States Immigration Service, *Petitioners,*

v.

UNITED STATES OF AMERICA, on the Petition of PRESTON M. ALBRO, an Attorney, for Mary Cook and Antonio Danelon.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

Statement.

The questions of fact are not disputed. The relators are both British Subjects, residents of Canada, Danelon being a naturalized Canadian, and Mary Cook being a subject of Great Britain through birth in Scotland.

The Circuit Court held that the respondents were "non-immigrants" under Section 3 of the Immigration Act of 1924 (now Sec. 203, 8 U. S. C. A.), and that in entering the United States to perform labor for hire, but maintaining their residence in the Dominion of Canada, they came within the Exception (2) thereof. The Court further held that they had the right to enter the United States temporarily for business purposes and they could not be excluded at the border under General Order 86, effective December 1st, 1927, which the Court below ruled was without authority of law. The Circuit Court also held that Article III of the Jay Treaty was still in force and effect and that the relators, as British Subjects, were entitled thereunder to pass and repass the border for the purpose of seeking or engaging in employment, but maintaining their residence in Canada.

Summary of Argument.

Before proceeding with the formal argument on the two main questions of law involved in this case, we respectfully desire to call to the Court's attention what we believe to be essentially the true meaning and purport of the Immigration Acts. We think it is essentially accurate to state that the Immigration Acts do not and were not intended to exclude *any mentally, morally and physically sound person*, with the exception of Asiatics, from **entering** this country and the whole purport and intent of all the present Immigration Acts was **to limit the number of aliens seeking to enter this country for the purpose of obtaining a residence or domicile.** There may be certain exceptions to this general statement, but, fundamentally, this is true, and, if the Court, in construing the provisions of the Immigration Act, considers it not as designed to bar

people from this country but only designed to bar certain numbers of persons from obtaining permanent residence in this country (and also, of course, those unfit to temporarily or permanently mingle with our peoples), we believe a decision reached by the Court in that light will more conform to the spirit of the law. The attitude of those administering the Immigration Acts, we submit with all respect, is that all persons entering this country for any purpose, temporarily or permanently, are to be kept from the country by the provisions of the Act, if possible, particularly in the case at bar, where, as appears from the petition for certiorari presented by the Government, the exclusion of persons of the class of the relators herein was done at the instigation of the Labor Unions. It seems unfortunate that the administration of the Immigration Act is under the direction of the Secretary of Labor, an official who is primarily appointed to represent the interests of a particular class of people.

Argument.

(Although the brief of the Government considers first the effect of the Jay Treaty of 1794, we feel that the order of treatment of the questions in the case by the Circuit Court was the logical one, and, therefore, present those two questions in that sequence. Unless specially noted Italics in references to statutes, decisions and citations are ours.)

POINT I.

General Order Number 86 Is Invalid and Void as In Contravention of the Immigration Acts.

For the convenience of the Court, we quote again that order, so far as material here:

"1691

U. S. Department of Labor
BUREAU OF IMMIGRATION
Washington

No. 55479/537
55266/General April 1, 1927.

GENERAL ORDER No. 86

SUBJECT: Land border crossing procedure.

1. ***Hereafter*** aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to seek employment in this country *will not be considered as visiting the United States temporarily for business or pleasure*, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the '*immigrant*' class.

2. However, the following aliens of the said 'immigrant' class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessable on aliens entering permanently at the time of original admission, and, provided further, that they are not coming to seek employment."

The exceptions following do not in any way affect the two aliens in behalf of whom this writ was issued.

In substance, this rule requires British subjects, crossing daily for work, to obtain consular immigration visas and classifies such persons as "immigrants," where heretofore, up to the present time, such persons have been classified as "non-immigrants".

Such authority as rests in the Department of Labor at the present time to make any such regulations is contained in Section 102, 8 U. S. C. A., the material part of which reads as follows:

"The Commissioner General of Immigration under the direction of the Secretary of Labor shall have charge of the administration of all laws relating to the immigration of aliens into the United States, and shall have the control, direction and supervision of all officers, clerks, and employees appointed thereunder. He shall establish such rules and regulations, prescribe such forms of bond, reports, entries and other papers and shall issue from time to time such instructions *not inconsistent with law*, as he shall deem best calculated for carrying out the provisions of this section and sections."

As to the power to make regulations, we refer the Court to The Parthian, C. C. A. N. Y., 1921, 276 Federal, 903, from which we quote head note 3:

"While the Commissioner may make regulations to enforce the Immigration Act, it was not permissible for the department to make or proclaim regulations which were beyond the powers delegated by the Congress to the Commissioner, by Section 23 of the Immigration Act (Section 959)."

We also call the Court's attention to the case of *Merkle, et al., v. Paschkes*, 123 Misc. N. Y. 203; 204 N. Y. Supp. 102, which holds in substance, and we quote from the head note:

"The Commissioner General of Immigration exceeded his powers under Immigration Law, Section 23, in formulating the rule that no attorney shall demand or receive compensation exceeding $25 for appearing in behalf of the United States, or of an alien, or aliens constituting one family applying for admission unless authorized to do so by the department or officer in charge of the immigration station; hence the rule is invalid as being legislation."

The broad principle is enunciated that a legislative body may not delegate its powers but may authorize an executive officer to adopt reasonable rules to carry out legislation which *it* has enacted.

Is it not legislation as in contradistinction to a departmental rule to classify as an "immigrant" one whom Congress has classified as a "non-immigrant" clearly and emphatically?

It is true that the authority given by Section 24 of the Immigration Act of 1924 to pass regulations omits the words "*not inconsistent with law.*" This insertion is, of course, not necessary in any event, but the later sections of the Act of 1924 state that such act is to be construed as supplemental to the Act of 1917.

It is our contention that this regulation, promulgated pursuant to said section is beyond the powers of the Commissioner General of Immigration, acting under the Secretary of Labor, in that it contravenes the purpose and intent of Section 203 (8 U. S. C. A.) and is beyond the powers delegated by Congress. Not only that, but as we shall show later, in effect it attempts to nullify Article 3 of the Jay Treaty of 1794, between Great Britain and the United States, which we believe has never been abrogated.

Section 203, (8 U. S. C. A.) reads as follows:

> "'IMMIGRANT' defined. When used in this Chapter the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except * * * (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure."

The question is then presented as to whether or not an alien desiring to cross daily for employment is an "immigrant", as contended by the Petitioners or a "non-immigrant", as contended by us. If, as we contend, the Respondents are not immigrants, then they were entitled to

their discharge because they were held upon a "conclusion of law" which cannot be supported upon the evidence adduced at the hearing.

It is our contention that the aliens at bar are entering the United States "temporarily for business."

The Petitioners maintain that "business" does not include the ordinary vocations of man, but includes only trading and merchandising. *With this contention we are at odds.* We refer to the Court the definition of "business" in *Corpus Juris*, and other text books, and cases cited thereunder. We quote from *Corpus Juris*, Volume 9, under heading "BUSINESS":

> "That which occupies the time, attention and labor of men for the purpose of a livelihood or profit; that in which one engages for the purpose of livelihood, profit, or the like; that which occupies the time, attention and labor of men for the purpose of profit or improvement; that employment which occupies the time, attention and labor; employment, etc., etc."

and we refer to the cases cited in the foot notes thereunder.

The word "business", in its *present sense*, embraces everything about which one can be employed, and, in *its narrower sense*, it signifies *a calling for the purpose of livelihood or profit.* See Easterbrook v. Hebrew Ladies Orphan Society, 82 Atl. 561, 563; 85 Conn. 289; 41 L. R. A. (N. S.) 615.

Business, "a very comprehensive term which embraces everything about which a person can be employed"; again "that which occupies the time, attention and labor of men for the purpose of a livelihood or profit, but it is not necessary that it should be the sole occupation or employment."

It embraces everything about which a person can be employed, *Flint v. Stone Tracy Co.*, 220 U. S. Rep. 107, 111.

See also *re* above

People v. Commrs. of Taxes of New York, pages 242, 244, 23 N. Y. Rep. and the case of,

The Parker Mills v. Commrs. of Taxes, 23 N. Y. 244.

Also

Brown v. German-American Title & Trust Company, 34 Atl. 335, 343; 174 Pa. 443.

(ALL ABOVE CASES GIVE SIMILAR DEFINITIONS OF WORD.)

Business means, occupation or employment, see

Olson v. Ostby, 178 Illinois App. 176.

"The employment which occupies the time, attention and labour."

(See

Adam v. Musson, 37 Illinois App. 503.)

"Business is a word of large signification and denotes the employment or occupation in which a person is engaged to procure a living."

See

Goddard v. Chaffee, 84 Mass. (2 Allen), 395, 79 Amer. Dec. 796.

"The word BUSINESS is of large significance and denotes the employment or occupation in which a person is engaged to procure a living."

See

Allen v. Commonwealth, 78 N. E. 287, 288;—188 Mass. 59, 69 L. R. A., 599 (quoting and adopting the definition in the case of

Goddard v. Chaffee, 84 Mass (2 Allen), 395, 79 Amer. Dec. 796.)

The decisions of the Courts of England are to the same effect, and are in line with the United States cases.

See the case of *Smith v. Anderson*, (1880), 15 Chancery Division, 258, where Sir George Jessel, Master of the Rolls, said:

> "*Business* itself is a word of large and indefinite import; it is a word of extensive use and indefinite signification; anything which occupies the time and attention and labour of a man for the purpose of profit is business; the legislature could not well have used a larger word."

We respectfully submit that upon these definitions it must be held that an alien who enters in the morning to follow his vocation and returns in the evening has made a *temporary entry* within the meaning of the statute, for the purpose of business.

If the Court, notwithstanding these definitions considers the definition of "business" by Congress ambiguous, then the definition given in the statute fails and the Court should, we submit, construe the term "immigrant" according to the most obvious import of the language used. We do not believe that it will be necessary for the Court to go so far as to construe the term "immigrant," but if it should find it necessary, we respectfully submit the following:

From Corpus Juris, volume 2, under "Aliens," definition:

> "Immigration is the removing into one place from another; the act of immigrating; the entering into a country with the intention of residing in it, etc.
>
> "Immigrant is a person who removes to a country for the purpose of permanent residence."

From Webster's New International Dictionary of 1926:

> "One that immigrates; one that comes to a country for the purpose of permanent residence; to settle."

From Funk & Wagnall's New Standard Dictionary of the English Language, 1923:

"One who or that which immigrates; a foreigner who enters a country to settle there; one who removes from one place to another."

FROM CHAMBERS' TWENTIETH CENTURY DICTIONARY:

"to migrate or remove into a country; one who immigrates."

The Courts have construed the meaning of "immigrant" on many occasions.

One of the leading cases is *Moffit v. United States*, 128 Federal, 375, page 380. We quote from this case:

"'Immigrate' means to move into a country for the purpose of permanent residence. An alien immigrant to the United States is an alien who comes or removes into the United States for the purpose of permanent residence, but aliens composing the crew of a vessel visiting our seaports are in no sense immigrants.

"'Immigration' is the passing or removing into a country for the purpose of permanent residence. The legislation contained in the various statutes that have been passed, relating to immigration, is clearly directed against the immigration into this country of certain classes of persons who come in with the intent of entering into and becoming a part of the mass of its citizens or population."

The reason that the immigration officials are holding these aliens to be "immigrants" is solely the fact that the Secretary of Labor in conjunction with the Commissioner General of Immigration promulgated the General Order 86, above referred to. That is, in accordance with the Order, these aliens are not to be considered as "visiting the United States temporarily as tourists" or "temporarily for business."

If an immigrant is a person who desires to change his domicile, then the aliens in whose behalf this writ is ob-

tained *are not* "immigrants." ***Can it be assumed that Congress in defining the word "Immigrant" intended to do violence to the accepted meaning of the word and the obvious import of the language used? We think not.*** It is self-evident that an administrative official cannot by his own act change the definition of Congress. (We call attention again to the fact that the definition of "immigrant" in Section 203 is in substance—one who comes from without the United States to the United States *except* temporarily for business.) That aliens of this class are not immigrants was decided adversely to the Government in this District Court thirty-six years ago in the case of *U. S. v. Michigan Central R. R. Co.*, 48 Fed. 365, when the Government attempted to fine the Michigan Central Railroad Co. for bringing a telegraph operator into Niagara Falls, N. Y., from Canada, to work for the company at Niagara Falls. This case was a proceeding by the United States to recover a penalty from the Michigan Central R. R. Co. for alleged violation of the Contract Labor Law, based upon the fact that the railroad, at its Niagara Falls, N. Y., office employed a telegraph operator who resided in Canada, and that it had full knowledge of the fact that he did so reside.

The Contract Labor Law then, as now, prohibited the *immigration* into the United States of laborers under contract. There was no question that the employee, Mr. Blaut, resided in Canada and came to the United States to work. The question was whether the railroad had induced him to "*migrate*" to the United States under contract of employment. On this issue, the court said *verbatim:*

> "*Mr. Blaut was not an immigrant because* **he did not come here intending to acquire a permanent or a temporary home.**"

This is the condition under which the **commuters** on the Canadian border enter the United States; they return in the evening to their homes in Canada. It follows that the immigration authorities not only are wrong when they attempt *to classify* such people as "immigrants" but they are acting contrary to the decision of the Courts which decided the question adversely to them thirty-six years ago.

It seems to follow that General Order 86, which raises the same condition, should be dealt with in the same way as the complaint against the Michigan Central. The aliens in this case are "non-immigrants" under the Statute, and cannot be made "immigrants" merely by *departmental order*, contrary to the intent of the Act of Congress. It follows that the writ should be sustained on this point alone.

The exceptions stated in Rule 86, which Counsel for the Government contends ameliorates its apparent harshness, soften it in no way in the particular case of either of these Respondents, as they do not come within the exceptions.

The District Court referred on the argument herein to the question of the rule itself having provided an opportunity of six months for British subjects intending to *immigrate* into this country to secure the Consular Vise. This is true. When it was seen on or about November 28th that a great hardship was to be worked upon many British subjects whose Waiting List number did not entitle them to enter into the United States, an order was issued allowing them to cross pending the reaching of their number on the Quota List (this, as a matter of fact, retards others who are waiting) *but* it, in no way, applies to British subjects in Canada who do not desire to *immigrate*, but only desire the border crossing privilege to and fro. The Consular Vise and

numerical limitation was never intended for the purpose of mere border crossing, and statements are required showing **an intention to change domicile.** Thus, those British subjects who have not a bona fide intention of a dwelling in the United States must either falsify or be deprived of the border-crossing privilege.

Bluntly put, General Order 86 classifies as an "immigrant" a person who under Section 203 8 U. S. C. A. was specifically made a "non-immigrant." This, we respectfully submit is, "inconsistent with the law" as provided in Section 102, and, in addition, has the momentous effect of violating a solemn treaty between Great Britain and the United States.

We have examined the Immigration Act with care, and we can find no word which indicates an intent on the part of Congress to override the provisions of any existing treaty with Great Britain. Unless there is such a clear intent found in the statutes, or even if there is doubt on that subject, then all the provisions of the Jay Treaty may be brought before the Court as pertinent to this issue.

POINT II.

The Treaty between Great Britain and the United States, known as the Jay Treaty of 1794, prevents the exclusion of the Respondents.

The Relators herein claim the right of free, temporary passage across the Canadian border under Article III of the Treaty of Amity, Commerce and Navigation of 1794, commonly called the Jay Treaty, and the additional, "Ex-

planatory Article" of 1796, the pertinent portion of which reads as follows:

> "It is agreed that *it shall at all times be free* to His Majesty's subjects, and to citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, *freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other.*"

Attention is called to the words—"it shall at all times be free," in contradistinction to word "freely" in later part of the clause.

By Article 28 of the Treaty of 1794, it was provided that the **first ten articles of the Treaty were to be permanent.** See Article 28, first line, which says: "It is agreed that the first ten (10) articles of this treaty **shall be permanent.**" The other articles all expired by their own time limitation. (See Moore Digest of International Law, Vol. 5, page 372.)

(For Jay Treaty of 1794, *see Volume One* (1), *of "Treaties, Conventions, Agreements,"* 1776 *to* 1909, *by William M. Malloy, of the State Department at Washington, at pages* 590 *to* 606, *and pages* 607 *to* 609, *for the additional "Explanatory Article" of* 1796.)

Treaties and Acts of Congress—A Grouping of Authorities Governing Construction and Reconciliation of Both.

At this point we respectfully submit that if this Court should be in doubt as to whether or not the Immigration

Act shows any intent to nullify, or is in any way inconsistent with the Jay Treaty, may we respectfully submit the following authorities governing the general question under what conditions an Act of Congress supersedes a previous treaty.

(See also Sec. 224, 8 U. S. C. A. *post.)*

A treaty may supersede a prior Act of Congress, and an Act of Congress may supersede a prior treaty.

The Cherokee Tobacco Case, 11 Wallace 616, at page 621.

It is not sufficient to urge against an Act of Congress that it conflicts with or violates a prior treaty. A treaty has no superior sanctity over an Act of Congress. (Head Money Cases, 112 U. S. 580.) It is true that Courts will be slow to assume that Congress intends to violate a treaty right. *(United States v. Mrs. Gue Lim*, 176 U. S. 459; *Chew Heong v. United States*, 112 U. S. 536); but in case of an *irreconcilable conflict* between an Act of Congress and a Treaty the last in date will prevail.

Hijo v. U. S., 194 U. S. 315, at page 324.

A Treaty is of equal force with Acts of Congress; *Ex. P. Scherer*, 195 Fed. 334.

Treaties the Supreme Law of the United States; see *U. S. v. Rauscher*, 119 U. S. 407; *Court v. Hawes*, 113 Bush. 697; *Blanchford v. State*, 10 Tax App. 627.

Treaties and Acts of Congress stand on an equal footing as the Supreme Law of the land: *General Electric Company v. Robertson*, cited in 21 Fed. (2nd) 214, 215.

If clear and explicit, an Act of Congress must be upheld by the courts even in contravention of express stipulations in an earlier treaty.

Fong Yue Ting v. United States, 149 U. S. 698, at page 720.

This, we believe, is the leading case on this particular phase of the subject, and would be cited by the Government if the Government's Counsel could show any intent upon the part of Congress by the Immigration Act to *abrogate* this treaty, or this were a question of immigration. (We do not refer to Rule 86, which is not an Act of Congress.)

In that case it was stated, in the course of the opinion by Mr. Justice Gray:

> "In our jurisprudence it is well settled that the provisions of an Act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, *if clear and explicit*, must be upheld by the Courts, even in contravention of express stipulations in an earlier treaty."

The Court will recall that this case dealt with the broad question of Chinese exclusion and the provisions of a previous treaty with China, and specifically with the registration of Chinese residents in this country. The burden was thrust upon the United States Supreme Court of sustaining the validity of an Act of Congress which the Chinese said was contrary to the provisions of a pervious treaty with China. Since the ratification of that treaty, in certain states, the importation of Chinese labor had caused conditions to arise detrimental to the interests of the citizens of the States and of the United States. These aliens failed to conform to the customs of our country and the whole problem was one

of the ability of the two races to live congenially together in the same localities. It involved the question of *permanent domicile* within the United States. The Act of Congress in question did clearly show an intent to abrogate the provisions of a previous treaty, and was held to do so. In this case we have no such question of social welfare to our inhabitants, for we are dealing with temporary entrance and exit from the country of our friends in Canada, and not with the problem of the permanent immigration of a foreign race who cannot for ages adapt itself to our life and customs, or we to theirs.

We further respectfully submit that repeals by *implication* are not favored, as shown in the case of *Johnson v. Browne*, 205 U. S. 309, at page 321, and Acts of Congress *are always to be construed so as to conform to the provisions of a treaty if it is possible to do so.*

United States v. Whiskey, 108 U. S. 491, at page 496.

Rights granted under a treaty will be held to be in force unless clearly annulled by an Act of Congress.

Cheung Sum Shee v. Nagle, 45 Sup. Ct. 539.

"The Immigration Act (8 U. S. C. A.), and Prussian Treaty of May 1st, 1828 (8 Stat. 378), should, if possible, be construed so that both can stand together and be given effect." *Hempel v. Weedin*, 23 Fed. Rep. (2nd) March 22nd, 1928, page 949, citing the *New Haven* case at page 955.

See also to same effect the case of *Powers v. Comly*, 101 U. S. Rep. 101.

Any possible theory by which both can be in force must be adopted, if a reasonable construction can be given to both.

Ward v. Race Horse, 163 U. S. 504.

In the case of *Whitney v. Robertson* (1888) 124 U. S. 190, at page 194, Mr. Justice Field said:

> "When the two relate to the same subject, the Courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."

The quota act must be construed with the view of preserving treaty rights of aliens, unless they are clearly annulled. They are aliens entitled **to enter** in pursuance of a treaty.

> *Cheung Sum Shee v. Nagle* (Cal.) 1925, 45 S. Ct. 539; 268 U. S. 336, 69 L. Ed. 985.

And in the case of the *United States v. Schooner Peggy* (1801), 1 Cranch, U. S. 103, 109, Chief Justice Marshall, pronouncing the decision of the Court, said:

> **"The Constitution of the United States declares a treaty to be the Supreme Law of the land. Of consequence, its obligation on the Courts of the United States must be admitted."**
>
> **"Where a treaty is the law of the land, and as such affects the rights of the parties litigating in Court, that treaty as much binds those rights, and is as much to be regarded by the Court as an Act of Congress."**

A Treaty is the law of the United States of which all courts, State and National, are to take judicial notice; *U. S. v. Rauscher*, 119 U. S. 407, 425.

The construction of a Treaty is for the courts, which are not bound by the construction of the executive or diplomatic branches of government; *Ex. P. Charlton*, 185 Fed. 880; aff. 229 U. S. 447, 449, 33 S. 945; (1912). *U. S. v. Greene*, 146 Fed. 766.

On this question of revocation, or rather, paralyzation of treaty rights by subsequent Congressional action it is interesting to read the opinion of the District Court for the Eastern District of Michigan, Southern Division, in the case of *Hiram Walker & Sons, Ltd. v. Lawson, Collector of Customs and Internal Revenue*, 275 Fed. 373. Therein Walker & Sons, Ltd., made an attempt to ship carloads of intoxicating beverages through United States territory under bond, and the two defendants attempted to prohibit them from doing so under the provisions of the Volstead Act. The claim was made that the Volstead Act prohibited such shipment. The Court states, at pages 376 and 377, verbatim:

> "It is another established and recognized principle of statutory construction that repeals by implication are not favored, and that a later statute will not be held to have impliedly repealed an earlier one, unless full effect cannot be reasonably given to both. *United States v. Lee Yen Tai*, 185 U. S. 213, etc.
>
> "It is equally well settled that a treaty between the United States and a foreign country will not be regarded as abrogated, and rights thereby created taken away, by a subsequent statute, by implication, unless an intention to that effect is clearly and unequivocally indicated by the necessary operation of such statute, it being presumed, until the contrary is plainly manifest, that Congress intends no interference with such treaty rights; and it is only where the provisions of a treaty and the terms of a later statute are in irreconcilable conflict, and can not both remain in force, that the former will be considered as impliedly repealed by the latter. *Chew Heong v. United States*, 112 U. S. 536, etc."

There is no Conflict Between the Jay Treaty and the Immigration Act.

The right of Canadian citizens to pass and repass in the manner *allowed by the Jay Treaty*, and in which these

It is true that certain clauses of the treaty expired by their own limitations, but the first ten, it appears, were made permanent by a provision in Clause 28. (See Malloy, "Treaties and Conventions," Vol. 1, above referred to, and the note on page 580 thereof, at bottom of page, citing the foregoing New Haven case as the leading authority as to the effect of the War of 1812 on Treaties of United States with Great Britain and note at bottom of page 590.)

Bearing on this question, it is worthy of more than passing notice to remember that the United States Government has acquiesced in the crossing and recrossing border privileges, and they have been acted upon and in operation with the full knowledge of the United States Authorities, without objection, ever since the year 1794, and down to and including December 1st, 1927, or for a period of one hundred and thirty-three years. The United States Government has thus recognized the existence of that treaty and of the rights and privileges granted thereunder to all British subjects, and to citizens of the United States.

We also wish to point out that the Solicitor-General of the United States, in his petition and supporting brief for a writ of certiorari herein, on appeal to the Supreme Court of the United States, filed in June, 1928, referring to the Immigration Act of 1924, admits, on pages 9, 11 and 12, that:

> **"For nearly three years after that Act was passed, aliens residing in Canada were allowed to cross daily to work, on the theory that they were not immigrants. It must be admitted that the decision below has much to support it, and the fact that the Department of Labor so construed the Act of 1924 from its passage until April 1st, 1927, is not to be overlooked."**

(In his brief, page 16, the Solicitor General now states that the above quoted is erroneous. If the Court will refer to Paragraph 3 of General Order 86, set forth on page 60 of his brief, it will no doubt see that the original statement was correct, because otherwise there would be no occasion to refer to persons admitted to Border crossing privileges "since June 30th, 1924," nor would there have been a necessity to begin General Order 86 with the ominous word "HEREAFTER.")

We also respectfully submit that the *burden in this case is upon the Government to show that there was an intention by the passage of the Immigration Act to abrogate Article III of the Jay Treaty*, if our contention in regard to the mere suspension thereof during the War of 1812 is sound.

At about the same time as the decision in the New Haven case and in the year 1830 there arose in England the case of *Sutton v. Sutton*, Volume 1 Russell and Mylne Reports, page 675, where the Master of the Rolls, Mr. Justice Leach of the Court of Chancery, decided that the treaty of 1794 was still in full force and effect, and that the War of 1812 did not end or abrogate the treaty. He cites the New Haven case and says:

> "The relations which had subsisted between Great Britain and America, when they formed one Empire, led to the introduction of the ninth section of the Treaty of 1794, and, the privileges of natives being reciprocally given not only to the actual possessors of lands but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should not depend upon the continuance of a state of peace."

(Same case also cited by Professor J. B. Moore in his International Law Digest, Vol. 5, paragraph 779, pages 373, 374.)

In an official publication of the United States Government, known as the Treaties and Conventions between Great Britain and the United States 1776 to 1887, issued under the authority of the Forty-eighth Congress, second session, at page 1228, it is stated that treaties do not, *ipso facto*, become extinguished by war, and it refers to the New Haven case above mentioned as authority. Professor Wheaton, a leading American authority on International Law, and a former Minister to foreign countries for the United States Government, says the same thing.

Professor Woolsey, International Law, 6th Edition (1897), 263, agrees that the treaty was not abrogated, and Hon. John Bassett Moore, an outstanding authority on International Law, says that Article 9 was not annulled by the War of 1812, and is one of the permanent clauses of the Jay Treaty. Moore says, Vol. 5, 382, 383:

> "It may be affirmed that the proposition that all treaties are extinguished or annulled by war is unsupported by authority at the present time."

See Volume 5 Moore's Digest of International Law (1906) pages 372, 376 to 380, 382, and his Article in Volume One of the Columbia Law Review at page 213, regarding the effect of war on treaties. In Volume 5 he said that the Jay Treaty, Article 10, also operated during the War of 1812, and survived that war. See also Chancellor Kent's Commentaries on International Law, which supports Judge Moore. Kent says (Abdys edition), pages 393 and 394:

> "The tenth (10th) article of the treaty between the United States and Great Britain, in 1794, may be

mentioned as an instance of a stipulation made for war. It provided, that debts due from individuals of the one nation to those of the other, and the shares or moneys which they might have in the public funds, or in public or private banks, should never, in any event of war, be sequestered or confiscated. *There can be no doubt that the obligation of that article was not impaired by the War of 1812, but remained throughout that war,* and continued binding upon two nations, until they should mutually agree to rescind the article; for it is a principle of universal jurisprudence, that a compact cannot be rescinded by one party only, if the other party does not consent to rescind it, and does no act to destroy it."

We fully endorse the further quotation from Kent's Commentaries on International Law, cited by the petitioners on page 31 of their brief. Clearly, the author in the earlier part of the passage quoted was referring to the status of treaty provisions between two Nations during the existence of actual hostilities, while the latter part of the quotation deals with the question of *revival* of Treaty Obligations after a declaration of Peace. This is exactly our contention, that while Article III of the Jay Treaty was suspended during the War of 1812, it being in the nature of a *permanent* arrangement consistent with lasting friendship between two neighboring nations, immediately was revived *without any specific declaration to that effect.* Particularly is this true in view of the unmistakable intention that this Article should be permanent, as evidenced by the supplemental agreement of 1796.

In this respect, it would seem that the Government Brief has not distinguished properly between the suspension of the Treaty during the period of hostilities and the revival of the permanent Treaty Obligations upon the resumption of peace. On page 43 of the Government's Brief,

a quotation is made from the argument of counsel in the case of Sutton v. Sutton, 1 Russell & Milne's Reports, 663, in which he stated:

> "It was said before the Master, that the first ten articles of the treaty were to be 'permanent,' which was construed as synonymous with 'perpetual'; but that is a construction which the twenty-eighth article does not admit of. The very first article is, 'that there should be a firm and universal peace between *Great Britain* and the United States'; that is the first of the articles supposed to be ever-enduring. Yet, what became of it in 1813? There are many of the stipulations of the first ten articles, which could not possibly be observed in a state of war. The word 'permanent' is used, not as synonymous with 'perpetual or everlasting,' but in opposition to a period of duration expressly limited. The greater number of the articles of the treaty were to cease at the expiration of twelve years; the first ten were not to expire then, by the mere lapse of time; they were to continue so long as a treaty of peace was in force; but when war took the place of peace, and the treaty had no longer any existence, the ninth article could not continue in operation."

With respect to Article I of the Jay Treaty providing:

> "That there should be a firm and universal peace between Great Britain and the United States,"

we respectfully submit that **Article I, including that provision, was immediately revived at the expiration of the War of 1812, and has been recognized as in full force and effect continuously since that date to the present time,** and is a strong example of the character of the provisions of a treaty which are presumed to be revived immediately following war, having merely been suspended during hostilities.

Perhaps one of the most recent and striking examples of a determination of this question was *the insistence of the United States Government that treaties were not abro-*

gated by war, when this question arose after the war with Spain.

In 1899 the United States Government demanded that Spain carry out the terms of the Treaty of Madrid, of February 17, 1834, regarding payment of certain annual indemnities and claims of American citizens. Spain replied that the War of 1898 with the United States had terminated this old treaty. The United States Government answered that they refused to admit any such contentions, *because Spain's obligation under the treaty was made permanent* and the United States Department of State informed Spain that the Treaty of 1834, *being perpetual* in its nature, was not terminated or affected by the War of 1898, and as a result all the payments were made by Spain under the treaty as demanded. Here is an instance where, by Article 29 of the Treaty of Madrid, of July 3rd, 1902, made after the war with Spain, and after the Treaty of Paris of 1898 was signed, in which no provision was made regarding existing treaties, it is declared that all treaties, agreements, contracts and conventions between the United States and Spain, prior to the Treaty of Paris of 1898, should be "expressly abrogated and annulled," with the exception of the 1834 Treaty. And in this instance treaties existing prior to a war were terminated by a new treaty over three years after the treaty of peace was signed at Paris in 1898. See Prof. George G. Wilson of Harvard University, International Law, 1927 Ed. 208 and 430; Hyde, International Law, Vol. 2, page 92; Moore, International Law, pages 377, 378, 379.

Bearing directly on this aspect of the case for the respondents, we wish to cite what is said by Professor George G. Wilson of Harvard University in his book on Interna-

tional Law, 197, Second Edition, 430, where he states therein:

> "Some treaties may revive *ipso facto* on conclusion of the Treaty of Peace."

The general principle was stated in 1823 by the United States Supreme Court, in the New Haven case, *ante*.

Chancellor Kent, as has been quoted, cites the case of Sutton v. Sutton, *ante*, and it will be observed that the New Haven case and the case of Sutton v. Sutton are given by all the leading authorities in the field of International Law as authority for the propositions for which we contend.

For references see:

Crandall on Treaties, 1904 Ed., page 242;

Chancellor Kent Commentaries on International Law (Abdys Edition), page 394;

Professor James Brown Scott Leading Cases on International Law, 1st Edition, pages 427, 428; Sec. Edition, pages 93 and 468;

Charles C. Hyde International Law as applied and interpreted by the United States (1922);

Charles G. Fenwick Principles of International Law (1924), pages 444-468;

Evans Leading Cases on International Law (1917), pages 235, 240; (1922), page 398;

Pitt-Cobbett International Law, 4th Ed., Vol. 2, page 44;

Norman Bentwich Leading Cases International Law, (1913), at page 150.

We also refer to Edwin Moxey International Law, 1906, page 189, and Pasquale Fiore International Law Qualified,

1918, page 719, and Hannis Taylor International Business Law, 1901, page 604, citing Lawrence Principles of International Law, page 313, all of which take the position that such treaties are only suspended.

While these are the opinions of legal authorities, the leading American adjudication on the principle involved, as well as on the Treaty forming the basis of this appeal, is found in the New Haven case, *ante*, where the Supreme Court **expressly repudiates the doctrine contended for by the petitioners herein**. We feel, therefore, that we have sustained the burden of the argument on this point.

THE JAY TREATY OF 1794 WAS RECOGNIZED AS BINDING AND HELD TO BE IN FORCE AND DECISIVE OF THE QUESTIONS RAISED IN THE FOLLOWING CASES, AT THE TIMES AND DATES STATED, AFTER 1794 AND 1812.

Fitzsimmons v. Newport Ins. Co., 4 Cranch, 185; 2 Curtis U. S. 65, 69, *(1808)*:

"Condemnation of a neutral vessel for the intent to enter a blockaded port—considered in 1808 under provisions of the Treaty of 1794 by Chief Justice Marshall."

Fairfax v. Hunter, 7 Cranch, 603, 627; 2 Curtis U. S. 684, 691, 692, *(1813)*:

"Ejectment action involving those claiming rights under the Treaty of 1794."
Judge Story:

"For we are well satisfied that the treaty of 1794 completely protects and confirms the title of Denny Fairfax."

Jackson v. Clark, 3 Wheaton, 1; 4 Curtis Decisions, U. S. 153, *(1818)*:

"C. J. Marshall held that under Art. 9 of the Treaty of 1794 between the United States and Great Britain, British subjects, etc., may continue to hold land, etc. Defendant continued to be a British subject and he is entitled to hold and devise the land in question under that Treaty."

Craig v. Bradford, 3 Wheaton, 594; 4 Curtis U. S. 305, 308, *(1818)*:

"Judge Washington held that a defensible title, etc., is completely protected and confirmed by the 9th Article of the Treaty of 1794, between the United States and Great Britain."
(Confirms *Fairfax v. Hunter* case.)

Orr v. Hodgson, 4 Wheaton, 453, 464; 4 Curtis U. S. 442, 443, 445, *(1819)*:

"Discusses the question—Who are heirs—under the 9th Article of the Treaty of 1794."

Story, J., referring to the Treaty of 1794, said:

"By the express terms of the treaty, it might lawfully pass to her heirs."

Shanks v. Dupont, 3 Peters, 242, 250; 8 Curtis Decisions of Supreme Court of U. S., 395, 400, *(1830)*:

"A woman, a citizen of Charleston, S. C., who married a British officer with whom she went to England in 1782 and remained there till her death in 1801—is a British subject within the purview of the 9th Article of the Treaty of 1794 with Great Britain."

Story, J.:

"The question arises whether she and her heirs are not within the purview of the 9th Article of the Treaty with Great Britain of 1794. It appears to us that they plainly are."

"Now, Mrs. Shanks was at the time a British subject, and she then held the lands in controversy; she is

therefore, within the words of the Treaty. Why ought she not also to be held within the spirit and intent?"

"If the treaty admits of two interpretations, and one is limited and the other liberal, one which will further and the other exclude private rights, why should not the most liberal exposition be adopted?"

"It seems to us, then, that all British born subjects ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words, of the Treaty of 1794."

Blight's Lessee v. Rochester, 7 Wheat, 535; 5 Curtis Decisions of Supreme Court of U. S., 316, 319, *(1822)*:

"The treaties of 1783 and 1794 only provide for titles existing at the time those treaties were made, and not to titles subsequently acquired, etc."

The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven and Wm. Wheeler, 8 Wheaton, 464, *(1823)*:

"Under the Treaty of 1783, the property of such corporation as plaintiff is protected the same as that of an individual and title thus protected is confirmed under the Treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceedings, for the defect of alienage."

In the following case, the 2nd and 9th Articles of the Jay Treaty, 1794, were discussed and declared to be binding. *Forsyth v. Reynolds*, 15 Howard, 358, 20 Curtis Decisions U. S. 561, *(1853)*:

"Lands granted by the Act of March 3rd, 1807, in fulfilment of the 2nd Article of the Treaty of 1794, between the United States and Great Britain, were not donations, and did not disqualify a settler from receiving a donation under the Act of May 15th, 1820, and of March 3rd, 1823."

Harden v. Fisher, 1 Wheaton 300, 302; 5 Curtis Decisions of Supreme Court of U. S., 560, 561, *(1816)*:

(C. J. Marshall): "What British subjects holding lands in the United States must show under the Treaty of 1794, Article nine, so as not to be considered as aliens in regard to lands held by them in the United States."

Hughes v. Edwards, 9 Wheaton, 489, 496; 6 Curtis Decisions of Supreme Court of U. S., 146, 150, *(1824)*:

The title of alien mortgages is protected by the treaty of 1794, etc.

(Approves Harden v. Fisher, and *Orr v. Hodgson.)*

Judge Washington said:

"This objection would not, we think, avail the appellants, since the remedies, as well as the rights of these aliens, are completely protected by the treaty of 1794."

Denn ex. Dem. Fisher v. Harden, 1 Paine Circuit Court 55, Rep. of United States *(1812)*:

Reversed on appeal in 1 Wheaton Rep. 300; 5 Curtis Decisions Supreme Court 560 *(1816)*—where court found that plaintiff held title to the land in question at date of treaty of 1794.

(See same case above under *Harden v. Fisher.)*

Jackson ex. Dem. v. Augustus Porter, 1 Paine Circuit Court Reports of United States, 457, *(1825)*:

This case discusses boundaries of a post under *Article 2* of the Jay Treaty of 1794.

The Court said:

"Articles 2 and 9 of the 1794 Treaty were meant to protect legal and equitable interests in land and not trespassers and intruders without rights."

Judge Thompson, at pages 481, 482, 483, referring to the Jay Treaty of 1794, said:

> "The 2nd and 9th Articles have been referred to. The Treaty applies to the title whatever it is, and gives it the same legal validity as if the parties were citizens."

The Society for the Propagation of Gospel, etc., v. Wheeler, et al., 2 Gallison Circuit Court Reports of United States, 105, Fall Circuit Court of United States, New Hampshire, Oct. Term, *(1814)*, at Exeter:

Part of this decision falls under the Jay Treaty of 1794. Speaking of Article 9, Judge Story at page 135 says:

> "This article has never been annulled, and therefore remains in full force. It deserves and ought to receive a liberal construction."

See Judge Story at page 127, lines 6 on, where he refers to Article 9 of Treaty as overruling defendant's argument that the Gospel Corp. can not sue on account of alienage.

In the case of *Martin v. Hunter's Lessee*, 1 Wheaton, 304, 360, 368, 370; 3 Curtis Decisions of Supreme Court of U. S., 584, 588, 590 *(1816)*, Judges Story and Johnson refer to the Treaty of 1794 as being then in existence and of binding force, Mr. Justice Johnson holding, at page 370, that:

> **"THE TREATY OF 1794 HAD BECOME THE SUPREME LAW OF THE LAND * * * THE MAJORITY OF THE COURT DETERMINED THAT, AS A PUBLIC LAW THE TREATY WAS A PART OF THE LAW OF EVERY CASE DEPENDING IN THIS COURT."**

Private Correspondence.

Private correspondence concerning a treaty subsequent or prior to its negotiation is always of weight in determining the purpose of the treaty itself. The question whether a treaty is terminated in whole or part by war between the contracting parties has been the subject of much discussion.

The correspondence originally contained in the respondents' brief in answer to the petition for writ of certiorari herein, between John Quincy Adams, American Minister to Great Britain, and the British Foreign Minister, Lord Bathurst, in the year 1815 and 1816, has now been largely quoted in the petitioners' brief at pages 39 and 40.

We originally quoted this correspondence to indicate to the Court what a decided position the Government of the United States took to uphold the proposition that the permanent provisions of a treaty were not abrogated by war.

The petitioners herein apparently cite this correspondence for the purpose of showing the legal position taken by Lord Bathurst some 115 years ago.

Would the Government urge this Court to adopt what has always been maintained by this Government as an erroneous interpretation of the Rules of International Law, because probably for selfish reasons at that time Lord Bathurst insisted that certain provisions of the treaties were abrogated by war and not revived without specific recognition in a subsequent treaty?

We urge upon this Court that the more liberal spirit of interpretation should be the one to be adopted by this Court. The principles of interpretation, it seems to us, which should be applied specifically to the Jay Treaty of 1794, were enunciated in clear and unambiguous language of this Court through Mr. Justice Story, in the case of *Shanks v. Dupont*, 3 Peters, 242 and 250, (1830), where it said:

> *"It seems to us, then, that all British born subjects ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words, of the Treaty of 1794."*
>
> *"If the treaty admits of two interpretations, and one is limited and the other liberal, one which will further and the other exclude private rights, why should not the most liberal exposition be adopted?"*

As Mr. Justice Brown stated in the case of *Tucker v. Alexandroff*, 183 U. S., 424:

> "As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is, not only to avoid war and secure a lasting and perpetual peace, *but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit* which is calculated to make for the existence of a perpetual amity so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence."

Mr. Justice Brown, at page 437, also said:

> "The treaty should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose."

In the case of *Sullivan v. Kidd*, 254 U. S., 433, and *Missouri v. Holland*, 252 U. S., 416, the Supreme Court said:

"Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals and are to be executed in the utmost good faith, with a view of making effective the purposes of the high contracting parties; that all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole."

It is a well-settled rule, as determined by this Court in the case of *Hauenstein v. Lynham*, (1879), 100 U. S. Rep. 487, that:

> *"Where a treaty admits of two constructions, one restricted as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred."*

See also *Adams v. Akerlund*, 168 Ill. 632; 48 N. E. 454; *Marryatt v. Wilson*, 1 Bosanquet & Puller Rep., 435-436; *Geofroy v. Riggs*, 133 U. S., 258, 271; *in re Ross & McIntyre*, 140 U. S. Rep., 453, 475. Finally, we cite *United States v. Ferris, et al.*, and *Lane v. Stone*, 19 Fed. (2nd), 925, where Judge Bourquin wrote as follows:

> **"A decent respect for the opinion of mankind, national honor, harmonious relations between nations, and avoidance of war, require that the contracts and law represented by Treaties shall be scrupulously observed, held inviolate, and in good faith precisely performed—require that Treaties shall not be reduced to mere 'scraps of paper.'"**

The Jay Treaty was not Abrogated—but was Recognized by Both Governments as Late as 1842.

The Solicitor-General, referring to the Jay Treaty of 1794, states at the bottom of page 2, and at the beginning of page 3 of the petition for rehearing, that:

"In view of the fact that mutual rights were granted by Article III to British subjects and Amer-

> ican citizens, as well as to Indians dwelling on either side of the border, it reasonably might appear that any question regarding whether the treaty is in force and effect is a political and not a judicial one, * * * *"

and again on page 11 of the petition for rehearing, in referring to the same matter as above mentioned, he stated in the second paragraph on this page:

> "Furthermore, if the Circuit Court of Appeals is correct in holding that these aliens are admissible under the statutory exception relating to aliens coming to the United States temporarily for business, the Court need not have decided whether the Treaty of 1794 was in force and effect and should have left that matter to the decision of the political branch of the Government."

We respectfully submit that the political branch of the Government *has already passed* upon this question and decided that the Jay Treaty is in full force and effect. Under date of March 17th, 1919, the Hon. William Phillips, then Acting Secretary of State of the United States, transmitted to the Senate a letter in response to a resolution passed by the Senate directing the Secretary of State to furnish the Senate with complete information concerning, "The countries with which the United States has Treaties which prevent us from giving preference to Americans or American ships in the carrying of imports or exports, and what is necessary to be done to abrogate such Treaties, and what, if any, steps our Government has taken to secure the abrogation of the same." From his letter we quote:

> "The Acting Secretary of State transmits to the Senate herewith a memorandum prepared in the Department of State in response to the resolution quoted above. It is hoped that this memorandum will contain the information desired by the Senate."

The Jay Treaty of 1794 is then copied in full and appears in Volume 14, pages 5, 18 and 19 of the Senate Documents

of the 66th Congress of the United States, first session 1919. The then Acting Secretary of State then states with regard to the Jay Treaty of 1794 and Article III thereof:

> *"The Treaty from which the above quoted Article is taken contains no provision for abrogation; hence, agreement by the parties thereto would seem to be necessary effectively to accomplish its abrogation as an international agreement. No action has been taken by either government looking to abrogation."*

The resolution above referred to, and the letter and other documents quoted from the Acting Secretary of State, seem to show that the political department of the Government has already determined that the Jay Treaty of 1794 is still in full force and effect.

In order to further show and prove our contention to be right, and that the Jay Treaty of 1794 is still in effect and exists as a living force, and that it is a most important document for both nations and their interests, we ask the Court to consider for a moment Article number 5 of the Jay Treaty, which says:

> "Whereas doubts have arisen what river was truly intended under the name of the St. Croix River, mentioned in the said Treaty of Peace, and forming a part of the boundary therein described; that question shall be referred to the final decision of commissioners to be appointed in the following manner, etc., etc., etc."

By this 5th clause or article of the Jay Treaty of 1794, which Article it will be remembered is one of the ten (10) permanent clauses of that Treaty, provision is made for the appointment of three commissioners to determine the St. Croix River, and in accordance with these provisions of the said 5th Article the Commissioners met at Halifax, in the Province of Nova Scotia, Canada, in March, 1798, and

determined the River St. Croix, but left unsettled the place of its source; this was left in dispute until the year 1842.

(See "American Diplomacy, Treaties and Topics," at page 73 (1894); being a treatise by the late Professor Freeman Snow, formerly head of the Department of International Law and Diplomacy at Harvard University.)

Now, in the year 1842 a Treaty was entered into between Great Britain and the United States for the purpose among other things of settling and accurately defining the boundaries between the possessions of Great Britain in North America and the Territories of the United States.

This Treaty was concluded on August 9th, 1842, and proclaimed November 10th, 1842, and is known as the Webster-Ashburton Treaty.

By Article one (1) of that Treaty of 1842, the Treaty of Peace of 1783, and the Jay Treaty of 1794, are all treated as interdependent upon each other, and referred to and dealt with as valid and subsisting documents and still in full force and effect, and regarded as governing the final settlement, fixing, determination and location of the true boundary lines of the possessions of the nations referred to in North America, and as to the exact location of the said River St. Croix and the true place of its source.

In connection with the said boundaries and the St. Croix River, Article one (1) of the said 1842 Treaty declares, among other things, that:

> "It is hereby agreed and declared that the line of boundary shall be as follows: Beginning at the monument at the source of the River St. Croix as designated and agreed to by the commissioners under the fifth

(5th) Article of the Treaty of 1794, between the Governments of the United States and Great Britain, etc., etc., etc."

Article one (1) of the 1842 Treaty also refers to, incorporates and uses the Jay Treaty of 1794 as one of the vital documents in a chain of evidence necessary to properly and accurately fix, locate, determine, and settle certain portions of the whole boundary line between the United State of America and the British Dominions and possessions in North America, under and by virtue of the Treaty of Peace of 1783 to which the Jay Treaty of 1794 and the Webster-Ashburton Treaty of 1842 refer, as will be seen by reference to the said Treaty Articles, and to the provisions of the said Treaty of 1842, Clause (1).

This shows conclusively that the Treaty of Peace of 1783, and the Jay Treaty of 1794, are necessary and vital parts of the later Webster-Ashburton Treaty of 1842, in order to complete the boundary lines and determine the rights of each nation, and in regard to the said River St. Croix, and both Treaties therefore become embodied into and are treated and made living parts of the later 1842 Treaty, both by reference thereto and incorporation therein.

This seems a strong indication of recognition of the permanency of the Jay Treaty of 1794 by both nations in 1842.

(For authorities and Treaties on this matter, see the Volume of Treaties and Conventions between the United States and other powers, 1776 to 1887, Washington Government Printing Office, 1889, page 433, and also see, "Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers,

1776 to 1909," by William M. Malloy, Volume one (1), pages 650 and 651 for 1842 Treaty, and references therein to the Treaty of Peace of 1783 and to the Jay Treaty of 1794; and see Snow, "American Diplomacy—Treaties and Topics," pages 82 and 83, for summary of the 1842 Treaty.)

From the foregoing, we believe that we are right in our contention that the Jay Treaty, in so far as its features were made permanent, by its own terms and provisions is still in full force and effect.

The Supplemental Agreement of 1796 is Also Permanent.

The Supplemental Agreement of 1796 reads as follows:

"1796."

"EXPLANATORY ARTICLE TO THE THIRD ARTICLE OF NOVEMBER 19, 1794, RESPECTING THE LIBERTY TO PASS AND REPASS THE BORDERS AND TO CARRY ON TRADE AND COMMERCE.

"*Concluded May 4, 1796; Ratification advised by Senate May 9, 1796.*

"Whereas by the third article of the treaty of amity, commerce and navigation, concluded at London on the nineteenth day of November, one thousand seven hundred and ninety-four, between His Britannic Majesty and the United States of America, **it was agreed that it should at all times be free** to His Majesty's subjects and to the citizens of the United States, and also to the Indians dwelling on either side of the boundary line assigned by the treaty of peace to the United States, *freely to pass and repass*, by land or inland navigation, into the respective territories and countries of the two contracting parties, on the continent of America, (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other, subject to the provisions and limitations contained in the said article;

"And whereas by the eighth article of the treaty of peace and friendship concluded at Greenville on the third day of August, one thousand seven hundred and ninety-five, between the United States and the nations or tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimies, Miamis, Eel River, Weeas, Kickapoos, Piankashaws, and Kaskaskias, *it was stipulated that no person should be permitted to reside at any of the towns or the hunting camps of the said Indian tribes*, as a trader, who is not furnished with a license for that purpose under the authority of the United States; **which latter stipulation has excited doubts, whether in its operation it may not interfere with the due execution of the third article of the treaty of amity,** commerce and navigation; And it being the sincere desire of His Brittanic Majesty and of the United States that this point should be so explained as to remove all doubts and promote mutual satisfaction and friendship; And for this purpose His Brittanic Majesty having named for his Commissioner, Phineas Bond, Esquire, His Majesty's consul-General for the Middle and Southern States of America, (and now His Majesty's Charge d'Affaires to the United States,) and the President of the United States having named for their Commissioner, Timothy Pickering, Esquire, Secretary of State of the United States, to whom, agreeably to the laws of the United States, he has intrusted this negotiation: They, the said Commissioners, having communicated to each other their full powers, have, in virtue of the same, and conformably to the spirit of the last article of the said treaty of amity, commerce and navigation, entered into this explanatory article, *and do by these presents explicitly agree and declare, that no stipulations in any treaty subsequently concluded by either of the contracting parties with any other State or nation, or with any Indian tribe, can be understood to derogate in any manner from the* RIGHTS *of* FREE INTERCOURSE AND COMMERCE, *secured by the aforesaid* THIRD ARTICLE *of the treaty of amity, commerce and navigation, to the subjects of his Majesty and to the citizens of the United States, and to the Indians dwelling on either side of the boundary line aforesaid; but that all the said per-*

sons shall remain at full liberty FREELY TO PASS AND REPASS, by LAND OR INLAND NAVIGATION, INTO THE RESPECTIVE TERRITORIES AND COUNTRIES OF THE CONTRACTING PARTIES, *on either side of the said boundary line, and freely* to carry on trade and commerce with each other, according to the stipulations of the said third article of the treaty of amity, commerce and navigation.

"This explanatory article, when the same shall have been ratified by His Majesty and by the President of the United States, by and with the advice and consent of their Senate, and the respective ratifications mutually exchanged, shall be added to and made a part of the said treaty of amity, commerce and navigation, **and shall be permanently binding upon His Majesty and the United States.**

"IN WITNESS WHEREOF, We, the said Commissioners of His Majesty the King of Great Britain and the United States of America, have signed this present explanatory article, and thereto affixed our seals.

"Done at Philadelphia this fourth day of May, in the year of our Lord one thousand seven hundred and ninety-six.

(SEAL) P. BOND.
(SEAL) TIMOTHY PICKERING."

This additional and further International Agreement, entered into in the year 1796, is to be found in Vol. I, pages 607-609, of Malloy's Treaties and Conventions.

It is respectfully submitted that Article III of the Jay Treaty of 1794 and this Explanatory Article of 1796 cover, include and embrace three outstanding, separate and distinct subjects of agreement and international contract:

First, there is what is known as "*amity*," or friendship shown by giving British subjects and United States citizens the right freely to pass and repass, to come and go, cross and recross from one country to another freely without hindrance by or from the officials of either country;

Second, there is the right of *navigation;* the right to go freely into the waters of each country, as therein set forth;

Thirdly, there is the right freely to carry on *trade and commerce* with each other.

In fact, the very title of the Treaty of 1794 is that of amity, commerce and navigation.

The plain intent and purpose and the proper interpretation of the Third Article of the 1794 Treaty and of the 1796 "Explanatory Article" is to grant amicable intercourse among the people of each country on either side of the International Boundary. It gives a general freedom of business and social intercourse and freedom of navigation for the people of both countries.

The right to freely carry on trade and commerce is another right which is also given to the people of each country, and, in addition, the right of free navigation is once more affirmed in this 1796 "Explanatory Article," as it is called.

It is further submitted, that the reasons given in the early part of the foregoing new agreement or "Explanatory Article" of 1796, as justification for its negotiation and signature by the United States and Great Britain, support the contentions of the respondents herein beyond any further controversy, and it plainly states that it is entered into to remove any doubt which may exist as to the rights of the people of each country to cross and recross the border.

We would also particularly draw the attention of the Court to the fact that the last paragraph of this 1796 Agreement between the United States and Great Britain makes the 1794 and this 1796 Treaty and Agreement, by express words, "permanently binding upon His Majesty and the United States."

Abrogation Has Been Sought by Neither Party to the Treaty.

It would seem further that International Law and Practice require that the United States Government must first ask for the abrogation of the Jay Treaty before it can legally enforce the border regulations of Order 86 against British subjects in Canada, who desire to exercise their rights under the treaty, which are, both in United States and Great Britain held to be still in force. More especially is this true where these rights and privileges have been exercised under that treaty for upwards of 133 years, since 1794, without objection, and acquiesced in during all that period of time by the United States authorities.

On page 42 of his brief, the Solicitor General seems to attempt to avoid the effect of the letter of *March 27, 1919*, by the Acting Secretary of State, in advising the Senate that the Jay Treaty could not be considered to be abrogated, and has not been abrogated by consent of either government, by stating "The suggestion thus made seems to be contrary to the weight of opinion."

In view of the claims made on pages 2 and 11 of the petition for rehearing in this case that constructions of such matters should be left to the political branch of the government, it seems to us that the following expressions

are pertinent and sustain the previous opinion of the acting Secretary of State.

It is respectfully submitted that under such circumstances it will require the most clear and expressed words of abrogation, and the consent of both nations before it can be considered as abrogated, cancelled or annulled. We feel sure that the Court would welcome the statements of distinguished jurists on this question, and we, therefore, take the liberty of quoting from Honorable Shelby M. Cullom, a well-known United States jurist, and authority on International Law. He says:

> "It is true that the Supreme Court has held that an act of Congress may repeal a treaty, but such repeal would only be effective so far as our domestic law is concerned. The other nation would still have a right to consider us bound by our contract, and if the contract was broken on our part, it might lead to a declaration of war."—North American Review, Volume 180, No. 2, pages 335, 345.

Again, Mr. Bryce, the British Ambassador at Washington, in a communication to Mr. Knox, Secretary of State, on February 27th, 1913, stated in relation to the Act of Congress of August 24th, 1912, and the effect thereof upon the Hay-Pauncefote Treaty, as set out in Senate document No. 4741, 63rd Congress, 2nd Sess. 101:

> "His Majesty's Government conceive that International Law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that the nation which holds that its treaty rights have been so infringed or brought into question by a denial that they exist, must, before protesting and seeking a means of determining the point at issue, wait until some further action violating those same rights in a concrete instance has been taken, which, in the present instance would, according to your argument, seem to mean, until tolls have been actually

levied upon British vessels owned by citizens of the United States have been exempted."

Mr. Wu, the Chinese Minister, wrote to Mr. John Hay, the Secretary of State, on January 25th, 1899, as set forth in the Foreign Relations of the United States documents for 1899 at page 195, as follows:

"However much the courts may feel bound to follow the legislation of Congress, I apprehend you will not contend that adverse legislation or the judgment of a domestic tribunal can release a government from its solemn treaty obligations."

Again on this subject, the Marquis of Salisbury addressed a communication to Mr. Welsh, on November 7th, 1878, as set out in Foreign Relations of the United States, 1878, at page 323; as also did Mr. Chang Yen Hoon, Chinese Minister to Mr. Blaine, Secretary of State, July 8th, 1889, Foreign Relations for 1889, at pages 132 and 133; and also Mr. Caleb Cushing, Minister to Spain, wrote to Mr. Fish, Secretary of State, on January 13th, 1877, Foreign Relations for 1877, page 492, where it is stated that:

"The right of the nation to free itself from the burdens of a compact must rest in each instance on a more solid basis than the declaration of the Constitution with respect to the supremacy of the laws as well as treaties of the United States."

And Mr. Fish, Secretary of State, sent a despatch to the United States Minister in China, in 1869, wherein he said:

"You will make clear to the government to which you are accredited the settled purpose of the President to observe with fidelity all treaty obligations of the United States."

(Foreign Relations of the United States, 1870, at page 303.)

These quotations have been submitted to the Court only on the larger aspect of the question. Of course, we insist in this case that there has not been any intent demonstrated by an act of Congress to abrogate the treaty, but that it is General Order 86 which violates the treaty.

The express provisions of the Jay Treaty must be looked at, and treaty provisions must be construed as to best conform to accepted principles of international law, and not in derogation of them. See *Villas v. Marilla* (1911), 220 U. S. 345, at pages 358 to 395.

The treaty is an entire contract, all its articles and provisions are dependent on each other, and have the force of conditions. Each clause of a treaty has the force of a condition.

The violation of any one article of a treaty, is a violation of the whole treaty; for all the articles are dependent on each other, and one is to be deemed a condition of the other; and a violation of any single article overthrows the whole treaty. Kent's Commentaries on International Law, (Abdy Edition) 392; Foulke International Law, (Philadelphia, 1920), Vol. 1, 444.

It is a general principle of construction with respect to treaties that they shall be *liberally construed* so as to carry out the apparent intention of the parties, to secure equality and reciprocity between them. See Mr. Justice Field's remarks in *Geofroy v. Riggs*, 133 U. S. 258, at page 271, and in *re Ross*, 140 U. S. 453, at page 475.

The Supreme Court of the United States is reluctant to construe an act of Congress as in violation of an existing treaty, and further than this there can be imputed to Con-

gress no disposition or readiness to disregard the terms of the international agreements of the United States. See:

Ex parte Webb, 225, 663, at page 683;
U. S. v. Mrs. Gue Lim, 176 U. S. 459;
Chem Heong v. U. S., 112 U. S. 536, at page 539;
Lem Moon Sing v. U. S., 158 U. S., at page 538.

In re Chin A. On, 18 Fed. 506, 9 Sawy, 343, the Court said:

> "Before the courts will impute to Congress an intention to violate an important article of a treaty with a foreign power, that intention must be clearly and unequivocally manifested, and the language of the statute must admit of no other reasonable construction."

In this connection we call to the Court's attention the case *in re Hermann Thomas*, 12 Blatchford, Circuit Court Reports, page 370, referred to also in *Terlinden v. Ames*, 184 U. S. Rep. 270, (1902), where the Court said:

> "Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, *without the consent of the United States*."

It is also worthy of note that the preamble to the Covenant of the League of Nations gives it as one of the League's objects:

> "To achieve international peace and security by a scrupulous respect for all treaty obligations."

Even the Immigration Act itself contains numerous references to treaty obligations. For instance, Section 28 of the Act of 1924 (8 U. S. C. A. 224) subdivision "f," defines:

> **"The term 'immigration laws' includes this chapter and all laws, conventions and treaties of the United States relating to the immigration, exclusion or expulsion of aliens;"**

In the case of *Terlinden v. Ames*, 184 U. S. Rep. 270, decided in February, 1902, the late Chief Justice Fuller said:

> "But where sovereignty and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance."

In this case the decision *in re Hermann Thomas, (supra)*, is cited with approval, and the principles there laid down approved.

What the Jay Treaty of 1794 and explanatory article of 1796 mean both to the citizens of the United States and of Canada.

The Jay Treaty is what might be termed for the United States and Canada a charter of rights giving to British Subjects in Canada the right of entry into the United States at all times, and to the citizens of the United States the same right to enter Canada. This going to and fro and crossing and recrossing by the subjects and citizens of both countries under Clause III of that Treaty **is at all times to be free, without hindrance to the citizens of either country and is unlimited as to time and place of passage.**

It was intended to be a kind of freedom of mutual and national intercourse for the subjects and citizens of both countries. **It is not a matter of immigration at all.**

It is respectfully submitted that in view of the authorities herein cited to the Court and in view of the express language of the Treaty itself with regard to the permanency of Article III, that the real purpose of the negoti-

ators of the Jay Treaty of 1794 was, that the border crossing privilege should be a permanent right of both peoples.

A most striking indication of that intention is shown in "Jay's Treaty, A study in Commerce and Diplomacy," (Bemis). Appendix 3 to that book consists of an analytical comparison of Jay's original draft and the Treaty as finally drawn. On page 288, it is shown that the passage and repassage provision, was originally contained in the second paragraph of the draft, and the crossing rights for British subjects and citizens of the United States was contained in the ninth paragraph. The permanency of the Treaty articles in the draft was restricted to the first eight articles of the draft. The footnote (11) on page 288, points this out, saying verbatim:

> "This provision occurs in Article IX of the Jay draft and thus would have been limited to twelve years. Inclusion within Article III made it permanent in the Treaty."

The Convention of 1815.

A short reference to the above Convention will help to further explain the Jay Treaty of 1794, and the additional "Explanatory Article" of 1796.

On July 3rd, 1815, a new Convention, or Treaty Agreement, to regulate commerce and navigation between Great Britain and the United States was concluded and signed, and ratifications were exchanged at Washington on December 22nd, 1815.

This agreement was to last for four (4) years, but it was extended for ten (10) years by the Treaty of October 20th, 1818, and further indefinitely extended by a Conven-

tion of August 6th, 1827, subject to twelve months' notice of abrogation.

Regarding the present position of this Treaty-Convention, showing it to be still in force and effect, Senator Elihu Root, formerly United States Secretary of State, in his argument before the Permanent Court at The Hague in 1910, on the Fisheries Arbitration, referred to this 1815 Convention, incidentally, as follows:

> "The kind of right which was granted in the treaty of 1815, that treaty which was continued by the treaty of 1818, and which, I may observe, was again continued in 1827, and is the treaty under which we live today, to travel and reside."

The above Convention of 1815 will be found on pages 624 to 627 of Malloy's Treaties, Conventions, &c., Vol. 1, (1909), and also in a work by the late Professor Freeman Snow, of Harvard University, entitled: "Treaties and Topics in American Diplomacy," Boston, (1894), at page 76.

It will be remembered that all the articles of the Jay Treaty of 1794, except the first ten, expired by the time limitation stated in the treaty, and by the year 1807 all the articles, from number eleven inclusive to twenty-seven (27), had lapsed in accordance with the provision of article numbered 28 regarding this matter.

This Treaty-Convention of 1815 gives the people and inhabitants of His Majesty's territories in Europe full liberty and freedom to come, with their ships and cargoes, to all the United States territories in America, and permits them to reside there indefinitely, and to build houses for themselves, a similar privilege was given United States citizens.

By this Convention a number of the important articles of the Jay Treaty of 1794, which had expired under the time limitation of Section 28 of that Treaty, were revived and their essential parts again brought into force.

There was no necessity, however, to deal with the first ten (10) articles of the Jay Treaty, because they had already been made permanent and, so far as Canada was concerned, article three (3) of the Jay Treaty gave that country what was now being given to Great Britain and the United States under this new 1815 Convention, and which was previously enjoyed under the old expired clauses of the 1794 Treaty. For instance, Article one (1), and (2), of the 1815 new treaty-convention can be compared with, and are similar to, clauses (14) and (15) of the 1794 treaty.

Article (3) is similar to clause (13) of the 1794 treaty, article (4), referring to Consuls, compares with clause 16 of the 1794 treaty. But the most important article of this 1815 Convention for our argument is the last clause of article two (2) which, we contend, also preserves all our rights under article three (3) of the Jay Treaty of 1794, and the "Explanatory Article of 1796." The last clause of article number two (2), of the 1815 Convention, reads as follows:

> "*The intercourse between the United States and His Britannic Majesty's possessions* in the West Indies, and *on the Continent of North America, shall not be affected by any of the provisions of this article, but each party shall remain in the complete possession of its rights, with respect to such an intercourse.*"

POINT III.

Petitioners' brief contains statements which must be refuted here.

Contesting Petitioners' Brief Concerning Treaty Provisions.

The petitioners' brief takes up at some length the recent decision of the Circuit Court of Appeals in the case of *United States ex rel. Diabo v. McCandless*, 25 Fed. 2nd, page 71, and argues with some weight that this decision did not directly hold Article III of the Jay Treaty to be in effect. The Court did state, however, in the latter part of its opinion:

> "So far as we are advised, neither Great Britain nor the Dominion of Canada have denied to Indians of the Six Nations resident in the United States passage across the boundary line, and if the Jay Treaty is in force, as we find it to be, good faith and the observance of the Treaty calls for the same course of conduct by the United States."

In this connection, the petitioners' brief states on page 10, in discussing the facts of the case:

> "It is not important whether he was or was not naturalized (referring to Danelon), as only native born and not naturalized Canadians are exempt from the quota."

It seems that this is incorrect, because, if Danelon is a naturalized British Subject, he is granted the crossing privilege under the Jay Treaty, assuming it not to have been abrogated.

We further contend that the petitioners' brief is in error when it states, on page 41:

> "At this time the Canadian Immigration Officials will not permit American workmen to cross into Canada to labor or to seek employment."

We attach as an appendix hereto the Order of the Privy Council, passed on Jan. 31st, 1923, providing, in effect, that any citizen of the United States may enter Canada, provided he has sufficient means to maintain himself while seeking employment, if that is his purpose. This we believe to be most important as bearing on the statement of counsel that there seems to be no evidence that Canada has allowed Americans to enter Canada pursuant to the terms of the Jay Treaty. Is not the inference now to the contrary and that, bearing in mind the provisions of the Jay Treaty, Americans were specifically excepted by the Order of the Privy Council of January, 1923, still in effect? It seems to us that this is a substantial compliance with the provisions of the Treaty.

The petitioners' brief states that the Jay Treaty is brought into the case to make it appear that the Immigration Act, given the construction for which we contend, would violate the Treaty and repeal it, and further state that the Treaty is thus used to influence the construction of the statute so as to prevent an alleged conflict.

It does not seem to us that the Jay Treaty could be used to influence the construction of Section 203 for the reason that, if the two were inconsistent with each other, the relators herein would, notwithstanding their Treaty rights, be deprived of entry because the latter Act of Congress would take from them any power to urge their Treaty rights. This, in itself, answers the next statement of counsel to the effect that "any construction of the statute brought about as a result of the Treaty provisions will settle the meaning of the statute not only as to British Subjects, but as to all aliens, because what is a temporary visit for business for one alien is the same for all."

What we do contend for, and what we strongly urge, in accordance with the opinion of the Court below is that GENERAL ORDER 86 IS IMPROPER, and cannot be availed of to deprive the respondents herein from entering the United States, because THIS ORDER is illegal and void:

(1) because inconsistent with Sec. 3 (2) of the Immigration Act of 1924 (now Sec. 203, 8 U. S. C. A.)

(2) because interfering with a treaty right of the respondents.

It is contended by the learned counsel for the petitioners that only Article IX of the Jay Treaty was held in effect after the War of 1812. On the other hand, the learned counsel, in his main argument, attempts to show that treaties are absolutely abrogated by war and not merely suspended. The inconsistency of these two contentions is apparent. This point, we believe we have covered under Point II of the brief.

As bearing on the question of the intent of the two countries that Article III of the Jay Treaty should be permanent, counsel seeks, by making reference to other present laws, to draw the inference that other provisions of Article III have been considered abrogated. For instance, he refers to the provision providing for the freedom from duty on "peltries" brought by land, and again he refers to the rights given thereunder with regard to navigation of the Mississippi River.

The Tariff Acts of 1909 and 1922, which were the only ones easily available to us at the time of writing this brief, provide for no duty on raw furs or raw hides, and, further, so far as has been called to our attention, there is still no restriction to Great Britain to navigate with its boats the Mississippi River if it cared to. It may be that learned counsel has again drawn an incorrect inference.

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Counsel attempts to construe the crossing privilege as a trading privilege, entirely overlooking the fact that the two are **distinctly made separate,** both by the wording of the Treaty and the Supplemental Agreement of 1796.

Lastly, learned counsel refers to the Peace Treaties promulgated after the Great War, in which provisions for the revival of pre-existing treaties and the abrogation of those not revived are specifically made. Does this do more than indicate that the negotiators of the Treaty were seeking beyond any possible doubt to avoid misunderstandings thereafter?

Contesting Petitioners' Brief Concerning the Statute.

On page 16 of the petitioners' brief, the statement is made that General Order 86 was promulgated because aliens began to seek in large numbers to penetrate the border, contrary to the quota restrictions, and that the decision of the Circuit Court, holding that labor is included in a proper definition of business, opens the door to an influx of foreign labor.

In reply to this contention, we can only urge that the quota restriction are placed upon **immigrants only,** and have no reference to temporary visitors.

Again, the brief of the Government states:

> "Prior to the Immigration Act of 1924, the law treated as immigrants those arriving for indefinite or permanent stay, and not those visiting the United States for temporary purposes."

We respectfully submit that there was no necessity prior to the Immigration Act of 1924 to distinguish between

"immigrants" and "non-immigrants", and, therefore, the law then made no provision for "non-immigrants."

On page 50 of petitioners' brief, the claim is made that the origin of Section 3 of the Act of 1924 (Sec. 203, 8 U. S. C. A.) may be found in Section 3 of the Immigration Act of 1917, now Section 136, 8 U. S. C. A., in that part which grants exemption from the barred Asiatic zone to certain people. Apparently the fact is overlooked that the 1917 Act deals with "immigrants" only, not with non-immigrants, and, having barred all immigrants of the Asiatic class and no non-immigrant class having been created by the Act, it became necessary to create certain exceptions. Since that time, it has repeatedly been held that Section 3 of the 1917 Act does not apply to "non-immigrants," *ex rel. Phelps*, 14 Fed. 2nd, 679.

In final answer to petitioners' claim that the Immigration Act of 1924 had always been construed by the Department as preventing the entry of aliens temporarily for labor, we again call the Court's attention to the fact that the promulgation of General Order 86, effective Dec. 1st, 1927, effectively contradicts that statement, for the first word of the General Order is "HEREAFTER," and we call the Court's particular attention to the language of Paragraph III of General Order 86 (page 60 of petitioners' brief), in which reference is made to aliens "whose original admission occurred subsequent to June 30th, 1924."

In connection with the cases of the United States of America on the relation of John Graber v. Karnuth and the equity action of John Graber v. Karnuth, petitioners, attach to and make part of their brief the decision of the

Court below. There is no question that any construction of this Court of the meaning of Section 203, 8 U. S. C. A., will cover that phase of the Graber case also, and, if the relator Graber is entitled to enter as a temporary visitor on business, as held by the Court below, in accordance with its own decision in the case at bar, then the petition for certiorari leaves but one question in both cases, and that question is whether a visa on Graber's passport was a necessity, and, if so, how the refusal of the Consul to visa the passport may be overcome. It is unnecessary for us to discuss this matter at length here because the Court has before it the petition for certiorari in the Graber cases and may refer to them even though at the time of the argument of this case the petition for certiorari may not have reached the Court in due course.

A further point in connection with the Graber case should perhaps be called to the attention of the Court, particularly in view of the brief of the Government on the petition for certiorari herein. The Government contended in its petition for rehearing, referring to the Circuit Court decision in the Cook-Danelon case, as follows:

> "As a consequence of the decision as it now stands it is respectfully pointed out that not only British subjects of the white and black races, but also of the Oriental races, can enter Canada and immediately gain admission to the United States for practically an indefinite period without regard to the immigration laws which forbid the admission as immigrants of persons ineligible for citizenship. In fact, it follows that persons of any nationality must be admitted to the United States under this decision without regard to the immigration laws so soon as they become lawfully domiciled within Canada and thereby become British subjects."

It is presumed that counsel for the Government had in mind the decision of this Court in the *Pizarro case*, 2

Wheaton, 227, which held, in substance therein, in construing the Spanish Treaty of 1795, that the word "subject" should be given the same meaning as the word "people" or "inhabitants". Under this decision, a non-native British subject residing in Canada might be admissible as a British subject. We did not, however, in the Graber case make this claim before the Circuit Court, but called that case and the subsequent apparent narrowing of the Pizarro construction in the cases of *Carlysle v. United States*, 16 Wall, 147, and *Loi Hoa v. Nagle*, 13 Fed. 2nd, 80, 275 U. S. 475, to the Court's attention, and stated that it was a matter worthy of consideration, but urged its consideration *not as entitling the relator therein to enter this country under the Jay Treaty*, but *to enter this country without a passport visa* under the exception in the Executive Order of the President *exempting British subjects domiciled in Canada from the requirement of a visaed passport*. This matter is called to the attention of this Court in Point V of the petitioners' brief on the petition for certiorari in the Graber case.

We venture to suggest that if the question should be presented directly at some future time, the Bureau of Immigration will quickly take the position that the ruling in the *Pizarro* case would not apply to non-native Canadian Britishers, seeking to enter the U. S. under the provisions of Article III of the Jay Treaty.

POINT IV.

General Order 86 being contrary both to the Immigration Act and the Jay Treaty provisions, the aliens were illegally detained. It follows, the judgment below was right, and should be affirmed.

It is respectfully submitted that the judgment below should be affirmed.

PRESTON M. ALBRO,
Attorney for Respondents,
925 Manufacturers & Traders Bldg.,
Buffalo, N. Y.

GEORGE W. OFFUTT,
Of Counsel.

ADDENDUM:

After the completion of the paging of this brief, it was decided to call the attention of the court to two more cases on the question of liberal treaty construction:

Van Bokkelen case, Hyde, Vol. 2, page 67;
The Blonde and Other Ships (1922) Appeal cases, Privy Council of England, 1 App. P. C. 213.

APPENDIX "A".

Canadian Privy Council Regulation.

P. C. 183.

Wednesday, the 31st day of January 1923.

(As amended by P. C. 642 of the 11th day of April 1923.)

His Excellency the Governor General in Council, on the recommendation of the Acting Minister of Immigration and Colonization, is pleased to rescind the Order in Council of the 9th day of May, 1922 (P. C. 717) and the same is hereby rescinded as from and after the 15th February, 1923;

His Excellency the Governor General in Council, under the authority of section 38 of the Immigration Act 9-10 Edward VII, chapter 27, as amended by 9-10 George V, Chapter 25, and having regard to unemployment conditions now existing in Canada, is pleased to make the following regulation, and the same is hereby made and established accordingly:

From and after the 15th February, 1923, and until otherwise ordered, the landing in Canada of immigrants of all classes and occupations, is hereby prohibited, except as hereinafter provided:

The Immigration Officer in Charge may notwithstanding the provision of P. C. 23 of the 7th January, 1914, permit to land in Canada any immigrant who otherwise complies with the provisions of the Immigration Act, if it is shown to his satisfaction that such immigrant is—

(1) A bona fide agriculturist entering Canada to farm and has sufficient means to begin farming in Canada.

(2) A bona fide farm labourer entering Canada to follow that occupation and has reasonable assurance of employment.

(3) A female domestic servant entering Canada to follow that occupation and has reasonable assurance of employment.

(4) The wife or child under 18 years of age, of any person legally admitted to and resident in Canada, who is in a position to receive and care for his dependents.

(5) Any United States citizen entering Canada from the United States who shall satisfy the Immigration Officer in charge at the port of entry that he has sufficient means to maintain himself until employment is secured.

(6) Any British subject entering Canada directly or indirectly from Great Britain or Ireland, Newfoundland, the United States of America, New Zealand, Australia or the Union of South Africa who shall satisfy the Immigration Officer in Charge at the port of entry that he has sufficient means to maintain himself until employment is secured: Provided, that the only persons admissible under the authority of this clause are British subjects by reason of birth or naturalization in Great Britain or Ireland, Newfoundland, New Zealand, Australia or the Union of South Africa.

(7) A person who has satisfied the Minister that his labour or service is required in Canada.

(8) The father or mother, the unmarried son or daughter eighteen years of age or over, the unmarried son or daughter eighteen years of age or over, the unmarried brother or sister, of any person legally admitted to and resident in Canada, who has satisfied the Minister of his willingness and ability to receive and care for such relative;

Provided that this clause shall not apply to the relative of any resident of Canada who himself failed to observe the conditions under which he was admitted to Canada.

And Provided further that the provisions of this Order in Council shall not apply to Immigrants of any Asiatic race.

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

ARTHUR J. KARNUTH, United States Director of Immigration, and CHARLES DREHER, Inspector in Charge United States Immigration Service, Petitioners, v. UNITED STATES OF AMERICA, on the Petition of PRESTON M. ALBRO, an attorney, for Mary Cook and Antonio Danelon, Respondents.	= 198.

RESPONDENTS' MOTION FOR REARGUMENT.

AND NOW COME RESPONDENTS, Mary Cook and Antonio Danelon, by Preston M. Albro, their attorney, and pray for a rehearing and reargument, upon the grounds more particularly set forth in the Memorandum attached hereto.

Dated at Buffalo, N. Y., this 29th day of April, 1929.

PRESTON M. ALBRO,
Attorney for Petitioners-Respondents,
925 M. & T. Bldg.,
Buffalo, N. Y.

MEMORANDUM IN SUPPORT OF MOTION.

POINT I.

We respectfully submit that the meaning of the term "business" as adopted herein by the Court does not conform to the previous definitions approved by it, and further leads to a situation in the interpretation of the Immigration Act not foreseen nor contemplated.

While we fully appreciate that the present case directly involves only non native Canadians, we feel that the matter is of such importance that the possible result of the Court's decision should be called to its attention at this time by this proceeding.

The points we desire to stress are—that under the Court's decision

A. All aliens including native Canadians would be barred from temporarily entering the United States in the pursuit of non-commercial vocations.

B. Native Canadians would be barred from entering the United States daily for labor for hire, if they remain domiciled in Canada.

It is true that in *Bloom* v. *Richards*, 2 Ohio St. 387, 396, it was held as stated in the opinion herein that though labor may be business, it is not necessarily so, and the converse is equally true, that business is not always labor. In that case a statute was under consideration prohibiting "labor" on Sunday, and it was held that the drawing of a legal document was not a violation of the statute. The statute was of course framed for the purpose of the quiet observance of one day in seven in order to give laborers a day of rest. The decision, however, in that case does not state, nor does it even intimate, that labor for the purpose

of gaining a livelihood is not "business," although it intimates that labor is a narrower term.

The word business was not used in the Ohio statute under consideration, but its meaning was discussed because similar statutes of other states added the term "business" after the word "labor." The fact that it was omitted in the Ohio statute was considered by the Court as significant, and as stated, the drawing of a contract was not held to be violative of the statute prohibiting "labor." The definition of the word business therefore seems not to have been directly involved.

We submit, that the correct rule was stated BY THIS COURT in 1910 when in the case of *Flint v. Stone Tracy Co.*, 220 U. S. 107, the Court, on page 171, stated:

> "'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dictionary, 158, citing *People v. Commissioners of Taxes*, 23 N. Y. 242, 244: 'That which occupies the time, attention and labor of men for the purpose of livelihood or profit * * * It embraces everything about which a person could be employed * * *' Bouvier's Law Dictionary, Vol. 1, p. 273."

We respectfully call the Court's attention to respondents' original brief, pages 7 to 9.

The last paragraph of the opinion of the Court herein defines "BUSINESS" within the meaning of Section 203 (2), 8 U. S. C. A., as follows:

> "The word business as here used, must be limited in application to intercourse of a commercial character."

We appreciate that the Court in construing the word "business" as used in the Immigration Act sought to adopt a meaning which it deemed consistent with Congressional intent, as it believed that intent to be when the Acts of 1921 and 1924 were adopted; we do submit, however, that in departing, as we contend, from the ordi-

nary legal definitions of the word "business" the opinion of the Court will necessarily give rise to the situation outlined below, which would not arise had "business" been construed according to its usual meaning.

We believe that if we had called this to the Court's attention originally, the Court might not have held, as it did, that Congress in enacting Section 203, 8 U. S. C. A., intended to give a new or altered meaning to the term "immigrant" other than the definition theretofore generally recognized.

We respectfully submit that under this narrower definition of the word "business" adopted by the Court in its opinion, the following probably unintended and uncontemplated conditions will arise:

1. All aliens including native Canadians would be barred from temporarily entering the United States in the pursuit of non-commercial vocations.

No engineer, artist, actor, preacher, scientist or member of any of the professional classes could enter the United States for the temporary pursuit of his calling for compensation, as such business is not "Intercourse of a Commercial Character" within the opinion of this Court.

> (To avoid confusion, we desire to state here that this does not concern the permanent immigration as non-quota immigrants under Section 204 (d), 8 U. S. C. A., of a limited class of ministers and professors, nor with the exception of most of the classes described above from the operation of Section 136 (h), 8 U. S. C. A., as "contract laborers.")

2. Native Canadians would be barred from entering the United States daily for labor for hire, if they remain domiciled in Canada.

The decision of this Court specifically holds that labor for hire is not "business" within the meaning of the ex-

ception of the term "immigrant" in Section 203 (2), 8 U. S. C. A.

It also holds expressly in the paragraph beginning with the word "Second" that for that reason the relators herein must be classified as "IMMIGRANTS."

Aliens desiring to emigrate from a foreign country to the United States, whether Canadian born or otherwise, must possess themselves of immigration visaes and cannot be admitted to the United States unless they (1) "Have an unexpired immigration visa" (Sec. 213 (a), 8 U. S. C. A.).

The only advantage native Canadians have is that the issuance of immigration visaes in such cases is not numerically limited.

In every other respect, the Canadian of native birth is subject to all rules and statutory requirements prescribed for all other aliens. Thus he must pay a $10 fee for his visa (Sec. 202 (h), 8 U. S. C. A., and Sec. 207 (b), 8 U. S. C. A.) and the $8 head tax (Sec. 132, 8 U. S. C. A.).

The native Canadian must also EMIGRATE from the country whence he comes, and IMMIGRATE to the United States; that is, in order to be entitled to the privilege of returning from abroad as "an alien previously lawfully admitted" under Section 204 (b), 8 U. S. C. A., he must have definitely ABANDONED his domicile in Canada and established a new BONA FIDE DOMICILE in the United States.

If such a native Canadian who comes for work or employment only (temporarily or as commuter) is admitted as an "IMMIGRANT" and departs at the end of his daily or periodic employment to resume his domicile in the Dominion, he thereby abandons his status as a resident of the United States, and forfeits his right to re-enter under Section 204 (b), 8 U. S. C. A.

Hence, upon his reapplication the following day or week, he would be again required to produce an unexpired immigration visa and pay a new head tax.

Aliens previously lawfully admitted to the United States, leaving the country for temporary visits abroad,

are entitled to re-enter if, pursuant to Section 213 (b), 8 U. S. C. A., they are equipped with either:—

(a) a non-quota visa under the provisions of Section 204 (b), 8 U. S. C. A., or

(b) a return permit under Section 210, 8 U. S. C. A.

To obtain either of these documents, the State and Labor Departments require proof of unrelinquished residence in the United States.

In the well reasoned case of *Serpico* v. *Tendell*, U. S. Daily, December 23, 1928, an alien secured re-entry only because the District Judge found that as a fact the alien's residence had not been relinquished, notwithstanding protracted absence, and that therefore as a matter of law he was entitled to re-enter.

Only if he in good faith established a legal and actual residence in the United States is a native Canadian entitled to the privilege of "returning from a temporary visit abroad." The use of the word "visit" as applied to one leaving the United States for the Dominion in itself negatives the maintaining of a domicile in Canada, and in effect prohibits a native Canadian with a *bona fide* residence in Canada from daily entering for employment.

In support of these statements, we quote from the rules of the respective Departments:

General Instructions Consular 926, p. 34 (issued by authority of Sec. 224, 8 U. S. C. A.):

129. After an absence the burden of proof is on the returning alien to show

(a) That he was previously lawfully admitted to the United States;

(b) That he went abroad with the intention of returning to reside in the United States;

(c) That he has an established domicile in the United States.

* * * * * *

Immigration Laws and Rules, March 1, 1927, Rule 24, subdivision B, page 151.

This rule deals with application for return permits under Section 210, U. S. C. A., and requires the applicant to show

> * * * (3) place of residence in the United States, and the length of such residence;
>
> * * * * * *

and also refers therein to an alien claiming the right to obtain such a permit as "an alien previously lawfully admitted to the United States *for permanent residence*." The general rule is that in the interpretation of statutes, the rules of construction placed thereon by the Government departments concerned are entitled to great weight.

Under the Act of 1921, the Secretary of Labor established a rule (2a) that "temporary absence" shall be construed to mean "an absence in any foreign country (*without relinquishment of domicile*) not exceeding six months in duration," and this rule has been held reasonable (*U. S.* v. *Tod*, 297 Fed. 214; see also *Hee Fuk Yuen* v. *White*, 273 U. S. 639; *MacKusick* v. *Johnson*, 3 Fed. [2nd] 398).

The rules of the State and Labor Departments were undoubtedly adopted with reference to Section 225, 8 U. S. C. A., which makes the 1924 Act an Act supplemental to the 1917 Act. The title of the 1917 Act is "AN ACT TO REGULATE THE IMMIGRATION TO AND RESIDENCE OF ALIENS IN THE UNITED STATES."

> (For the sake of clarity and to avoid misunderstanding, we desire to further add that aliens previously lawfully admitted returning from a temporary visit abroad during which they have not been elsewhere than in contiguous territory are, by executive order, exempted from producing the documents mentioned above, a waiver authorized by Section 213 (b), 8 U. S. C. A. This exempts such aliens merely from the procedural necessity of procuring the documents; they must still prove on entry that they comply with the basic requirement, namely,

they must be found to be returning to an unrelinquished domicile. Substantive requirements could of course not be waived under the section cited *ante*. In the case of aliens habitually crossing the border, subdivision Q of Rule 3, Immigration Laws and Rules, *ante*, page 109, provision is made for identification cards "with a view to avoiding delays and embarrassment"; but in such case requirement is made that they must be crossing "upon legitimate pursuits," which would not avail a native Canadian, unless otherwise admissible under the Immigration Act.)

These consequences of the definitions of "business" and "immigrant" established by the Court's opinion were not specifically brought to the Court's attention upon the argument, or in the briefs; and it is respectfully urged that an opportunity to present them fully be afforded by means of a reargument, before the entire subject of immigration is thus revolutionized, and further restrictions apparently neither urged nor even contemplated by the Attorney General made effective by logical necessity.

Respectfully submitted,

PRESTON M. ALBRO,
Attorney for Respondents.

Certificate of Counsel.

I have prepared and read the foregoing motion for rehearing in this cause and hereby certify that I believe the same to be meritorious; that it is made in good faith and not for the purpose of delay.

PRESTON M. ALBRO,
Attorney for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 198.—October Term, 1928.

Arthur J. Karnuth, United States Director of Immigration, and Charles Dreher, Inspector in charge, United States Immigration Service, Petitioners,

vs.

United States of America, on the Petition of Preston M. Albro, an attorney, for Mary Cook and Antonio Danelon.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 8, 1929.]

Mr. Justice Sutherland delivered the opinion of the Court.

This case arose under § 3 of the Immigration Act of 1924, c. 190, 43 Stat. 153, 154, U. S. Code, Title 8, § 203, *et seq.*, which provides: "When used in this Act the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except . . . (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, . . ." The complete section, together with other pertinent provisions of the act, are copied in the margin.*

*Sec. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

Sec. 4. When used in this Act the term "non-quota immigrant" means—

. . . .

Neither respondent is a native of Canada. Mary Cook, is a British subject, born in Scotland, who came to Canada in May, 1924. She is a spinner by occupation and resides at Niagara Falls, Ontario. Antonio Danelon is a native of Italy, who came to Canada in 1923. He also resides at Niagara Falls, Ontario. He alleges that he became a Canadian citizen by reason of his father's naturalization. Both sought admission to the United States on December 1, 1927, as non-immigrants under the excepting clause (2) above quoted. Prior thereto, Mary Cook had crossed from Canada to the United States daily for a period of three weeks to engage in work at which she was employed. On the occasion in question, she was out of employment, but desired admission to look for work. Danelon had been at work in the United States for more than a year, crossing daily by the use of an identification card. He sought admission to resume work. Both were denied admission by the immigration authorities, on the ground that they were quota-immigrants within the meaning of the act, and did not come within the excepting clause, § 3 (2). The following departmental regulation, adopted under § 24 of the act, has been in force since September, 1925. "Temporary visits . . . for the purpose of performing labor for hire are not considered to be within the purview of section 3 (2) of the act." It is not disputed that both aliens were properly excluded if the validity of this regulation is established.

(c) An immigrant who was born in the Dominion of Canada, Newfoundland, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America, and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him;

. . .

Sec. 5. When used in this Act the term "quota immigrant" means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.

Sec. 24. The Commissioner General, with the approval of the Secretary of Labor, shall prescribe rules and regulations for the enforcement of the provisions of this Act; but all such rules and regulations, in so far as they relate to the administration of this Act by consular officers, shall be prescribed by the Secretary of State on the recommendation of the Secretary of Labor.

In a habeas corpus proceeding, brought in behalf of the two aliens, the federal district court for the Western District of New York sustained the action of the immigration officials and dismissed the writ. On appeal, this judgment was reversed. The circuit court of appeals held that an alien crossing from Canada to the United States daily to labor for hire was not an immigrant but a visitor for business within the meaning of section 3 (2) of the act. 24 F. (2d) 649. In reaching that conclusion the court seemed of opinion that if the statute were so construed as to exclude the aliens, it would be in conflict with Article III of the Jay Treaty of 1794, 8 Stat. 116, 117, a result, of course, to be avoided if, reasonably, it could be done. *Lem Moon Sing* v. *United States*, 158 U. S. 538, 549.

We granted the writ of certiorari because of the far-reaching importance of the question. The decision below affects not only aliens crossing daily from Canada to labor in the United States, but, if followed, will extend to include those entering the United States for the same purpose from all countries, including Canada, who intend to remain for any period of time embraced within the meaning of the word "temporary." By the immigration rules, this time is defined as a reasonable fixed period to be determined by the examining officer, which may be extended from time to time, though not to exceed one year altogether from the date of original entry. Thus, if the view of the court below prevail, it will result that aliens — not native of Canada or any other American country named in § 4 (c),—whose entry as immigrants is precluded, may land as temporary visitors and remain at work in the United States for weeks or months at a time.

First. The pertinent provision of Article III of the Jay Treaty follows:

"It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other. . . ."

The position of the Government is that (1) there is no conflict between the treaty and the statute, but, (2) in any event, the treaty provision relied on was abrogated by the War of 1812.

We pass at once to a consideration of the second contention, since if that be sustained, the first becomes immaterial and the statute open to construction unembarrassed by the treaty.

The effect of war upon treaties is a subject in respect of which there are widely divergent opinions. The doctrine sometimes asserted, especially by the older writers, that war *ipso facto* annuls treaties of every kind between the warring nations, is repudiated by the great weight of modern authority; and the view now commonly accepted is that "whether the stipulations of a treaty are annulled by war depends upon their intrinsic character." 5 Moore's Digest of International Law, § 779, p. 383. But as to precisely what treaties fall and what survive, under this designation, there is lack of accord. The authorities, as well as the practice of nations, present a great contrariety of views. The law of the subject is still in the making, and, in attempting to formulate principles at all approaching generality, courts must proceed with a good deal of caution. But there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent completed acts. On the other hand, treaties of amity, of alliance, and the like, having a political character, the object of which "is to promote relations of harmony between nation and nation," are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war. *Id.*, p. 385, quoting Calvo, Droit Int. (4th Ed.), IV. 65, § 1931.

In *Society, etc.* v. *New Haven*, 8 Wheat. 464, a case involving the right of a British corporation to continue to hold lands in Vermont, this Court was called upon to determine the effect of the War of 1812 upon the Ninth Article of the Jay Treaty which provides

"that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the

said lands and the legal remedies incident thereto, be regarded as aliens." 8 Stat. 116, 122.

It was held that the title to the property of the Society was protected by the Sixth Article of the Treaty of 1783, 8 Stat. 80, 83; was confirmed by the words of Article IX above quoted; and was not affected by the War of 1812. The applicable rule was stated (p. 494) in the following words:

"But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

"We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."

The English High Court of Chancery reached the same conclusion in *Sutton* v. *Sutton*, 1 Russ. & M. 663, 675:

"The relations, which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace."

These cases are cited by respondents and relied upon as determinative of the effect of the War of 1812 upon Article III of the treaty. This view we are unable to accept. Article IX and Article III relate to fundamentally different things. Article IX aims at perpetuity and deals with existing rights, vested and permanent in character, in respect of which, by express provision, neither the owners nor their heirs or assigns are to be regarded as aliens. These are rights which, by their very nature, are fixed and continuing, regardless of war or peace. But the privilege accorded by Article III is one created by the treaty, having no obligatory existence apart from that instrument, dictated by considerations of mutual trust and confidence, and resting upon the presumption that the privilege will not be exercised to unneighborly ends. It is, in no sense, a vested right. It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility. See 7 Moore's Digest of International Law, § 1135; 2 Hyde, International Law, § 606. The reasons for the conclusion are obvious —among them, that otherwise the door would be open for treasonable intercourse. And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of the war. Disturbance of peaceful relations between countries occasioned by war, is often so profound that the accompanying bitterness, distrust and hate indefinitely survive the coming of peace. The causes, conduct or result of the war may be such as to render a revival of the privilege inconsistent with a new or altered state of affairs. The grant of the privilege connotes the existence of normal peaceful relations. When these are broken by war, it is wholly problematic whether the ensuing peace will be of such character as to justify the neighborly freedom of intercourse which prevailed before the rupture. It follows that the provision belongs to the class of treaties which does not survive war between the high contracting parties, in respect of which, we quote, as apposite, the words of a careful writer on the subject:

"Treaties of the fifth class are necessarily at least suspended by war, many of them are necessarily annulled, and there is nothing in any of them to make them revive as a matter of course on the advent of peace,—frequently in fact a change in the relations of the parties to them effected by the treaty of peace is inconsistent with

a renewal of the identical stipulations. It would appear therefore to be simplest to take them to be all annulled, and to adopt the easy course, when it is wished to put them in force again without alteration, of expressly stipulating for their renewal by an article in the treaty of peace." Hall, International Law (5th Ed.), pp. 389-390.

Westlake classifies treaties not affected by war as (1) those providing what is to be done in a state of war, (2) transitory or dispositive treaties, including such as are intended to establish a permanent condition of things, such as treaties of cession, boundary, and recognition of independence, as well as those having no conceivable connection with the causes of war or peace, and (3) treaties establishing arrangements to which third powers are parties such as guarantees and postal and other unions. Westlake, International Law, Part II, pp. 29-32. He then says:

"Outside the exceptions which have been discussed, treaties between belligerents do not survive the outbreak of the war. At the peace there is no presumption that the parties will take the same view as before the war of their interests, political, commercial or other. It is for them to define on what terms they intend to close their interlude of savage life and to reenter the domain of law."

Fauchille, Traité de Droit International Public, 1921, Vol. II, p. 55, says that

"a state of war puts an end to treaties concluded with a view to peaceful relations between the signatories and the object or end of which is to strengthen or maintain such peaceful relations, for example, treaties of alliance, subsidies, guarantees, commerce, navigation, customs union, etc. Those treaties from their very nature are subject to an implicit resolutory condition, namely a break in the state of peace. They cannot survive the outbreak of hostilities between the signatory States. War, to them, is a cause of final extinction and not of mere suspension. When peace is concluded, they do not spontaneously come out of a comatose state; they do not revive unless expressly renewed in the peace treaty."*

* . . . *résolus par l'état de guerre les traités conclus en vue de relations pacifiques entre les signataires et ayant pour objet ou pour but la consolidation ou le maintien de ces relations pacifiques. Ex.*: les traités d'alliance, de subsides, de garantie, de commerce, de navigation, d'union douanière, etc. Ces traités sont par leur nature même affectés d'une condition résolutoire implicite, la cessation de l'état de paix. Ils ne peuvent pas survivre à l'ouverture des hostilités entre les Etats signataires. La guerre est pour eux une cause d'extinction définitive, et non une cause de simple suspension. La paix conclue, ils ne sortent pas spontanément d'un état de léthargie momentané; ils ne revivent pas, à moins qu'ils ne soient expressément renouvelés dans le traité de paix.

These expressions and others of similar import which might be added, confirm our conclusion that the provision of the Jay Treaty now under consideration was brought to an end by the War of 1812, leaving the contracting powers discharged from all obligation in respect thereto, and, in the absence of a renewal, free to deal with the matter as their views of national policy, respectively, might from time to time dictate.

We are not unmindful of the agreement in Article XXVIII of the Treaty "that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years." It is quite apparent that the word "permanent" as applied to the first ten articles was used to differentiate them from the subsequent articles—that is to say, it was not employed as a synonym for "perpetual" or "everlasting," but in the sense that those articles were not limited to a specific period of time, as was the case in respect of the remaining articles. Having regard to the context, such an interpretation of the word "permanent" is neither strained nor unusual. *See Texas, &c. Railway Co.* v. *Marshall*, 136 U. S. 393, 403; *Bassett* v. *Johnson*, 2 N. J. Eq. 154, 162.

It is true, as respondents assert, that citizens and subjects of the two countries continued after the War of 1812, as before, freely to pass and repass the international boundary line. And so they would have done if there never had been a treaty on the subject. Until a very recent period, the policy of the United States, with certain definitely specified exceptions, had been to open its doors to all comers without regard to their allegiance. This policy sufficiently accounts for the acquiescence of the Government in the continued exercise of the crossing privilege upon the part of the inhabitants of Canada, with whom we have always been upon the most friendly terms; and a presumption that such acquiescence recognized a revival of the treaty obligation cannot be indulged.

Second. In construing § 3 (2) of the Immigration Act, we are not concerned with the ordinary definition of the word "immigrant" as one who comes for permanent residence. The act makes its own definition, which is that "the term 'immigrant' means any alien departing from any place outside the United States destined for the United States." The term thus includes every alien coming to this country either to reside permanently or for temporary

purposes, unless he can bring himself within one of the exceptions. The only exception pertinent to the present case is the second, quoted at the beginning of this opinion, namely, an alien visiting the United States "temporarily for business or pleasure." The contention is that respondents were temporary visitors for business; and the case is, therefore, narrowed to the simple inquiry whether the word "business," as used in the statute, includes ordinary work for hire. The word is one of flexibility; and, when used in a statute, its meaning depends upon the context or upon the purposes of the legislation. It may be so used as either to include or exclude labor; "for though labor may be business, it is not necessarily so, and the converse is equally true, that business is not always labor." *Bloom* v. *Richards*, 2 Oh. St. 387, 396. The true sense in which the word was here employed will be best ascertained by considering the policy, necessity and causes which induced the enactment. See *Heydenfeldt* v. *Daney Gold, etc. Co.*, 93 U. S. 634, 638; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463; *Ozawa* v. *United States*, 260 U. S. 178, 194.

The various acts of Congress since 1916 evince a progressive policy of restricting immigration. The history of this legislation points clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor. In the report of the House Committee to accompany the bill which became the Quota Act of May 19, 1921 (H. of R. Report 4, 67th Congress, 1st Session), it was stated (p. 3) that one of the causes which called for the immediate passage of an act to restrict immigration was: "2. Large unemployment in the United States, making it impracticable for the United States to accept a heavy immigration." And further (p. 7): "In the opinion of a majority of the members of this committee the economic aspects of immigration alone call for the passage of this restrictive legislation, if there were no other reasons." In the Senate report upon the same bill (S. Report 17, 67th Congress, 1st Session, p. 4) one of the evils pointed out was that a large part of the new immigration had been of a migratory character, immigrants coming to the United States not so much for the purpose of permanent residence as to seek temporary profitable employment. The report of the House Committee to accompany the bill which afterwards became the Act of 1924, now under consideration, (H. of R. Report 350, 68th Congress, 1st Session) likewise makes clear that protection

of American labor was one of the controlling reasons for further restriction of immigration. The committee, after pointing out that various suggested plans for admitting laborers and farmers had been rejected, said (p. 22): "As has been so often said with reference to the demand for the admission of laborers, the present gain is not worth the future cost."

In view of this definite policy, it cannot be supposed that Congress intended, by admitting aliens temporarily for business, to permit their coming to labor for hire in competition with American workmen, whose protection it was one of the main purposes of the legislation to secure.

The word "business," as here used, must be limited in application to intercourse of a commercial character; and we hold that the departmental regulation, to the effect that temporary visits for the purpose of performing labor for hire are not within the purview of § 3 (2) of the act, is in accordance with the Congressional intent.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.